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LOUISIANA REPORTS

June 11 76

LOUISIANA REPORTS

(VOLUME 107)

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

LOUISIANA.

JURIDICAL YEAR 1901-1902.

EDITED AND INDEXED UNDER DIRECTION OF THE COURT BY

T. H. THORPE.

NEW ORLEANS:
F. F. HANSELL & BRO., LTD., PUBLISHERS.
1902.

Rec. Nov. 19, 1902.

JUSTICES OF THE SUPREME COURT

DURING THE TIME COVERED BY THIS VOLUME.

CHIEF JUSTICE:

FRANCIS T. NICHOLLS.

ASSOCIATE JUSTICES:

JOSEPH A. BREAUX,
NEWTON C. BLANCHARD,
FRANK A. MONROE,
OLIVIER O. PROVOSTY.

ATTORNEY GENERAL:

WALTER GUION.

CLERK OF THE COURT:

T. McC. HYMAN.

New Orleans.

IN MEMORIAM.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
SUPREME COURT OF THE STATE OF LOUISIANA. }

NEW ORLEANS, Monday, June 16th, 1902.

The Court was duly opened, pursuant to adjournment.
Present their Honors:—

FRANCIS T. NICHOLLS, Chief Justice.
JOSEPH A. BREAU, }
NEWTON C. BLANCHARD, } *Associate Justices.*
FRANK A. MONROE, }
OLIVIER O. PROVOSTY, }

Following the reading of the minutes of the court Mr. BENJAMIN FRANKLIN JONAS advanced to the Bar and, after an eloquent address commemorative of the character, career and distinguished services of the late

MR. JUSTICE LYNN BOYD WATKINS,

on behalf of his widow and two children, presented to the court a portrait of that lamented jurist. The Chief Justice, on behalf of the court, accepted the charge, and requested Mr. JONAS to convey to Mrs. WATKINS and her children the thanks of the court. It was ordered that the portrait be hung on the walls of the room in which the sessions of the court are held; that this event be made a matter of record on these minutes and in the court reports; and that a copy of these proceedings, under the seal of the court, be transmitted by the clerk to the widow and children of the deceased Justice.

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CASES
ARGUED AND DECIDED IN THE
SUPREME COURT OF LOUISIANA
AT NEW ORLEANS.

At Term beginning First Monday of November, 1901.

HON. FRANCIS T. NICHOLLS, *Chief Justice.*

HON. JOSEPH A. BREAUX,

HON. NEWTON C. BLANCHARD,

HON. FRANK A. MONROE,

HON. OLIVIER O. PROVOSTY,

Associate Justices.

No. 13,701.

STATE OF LOUISIANA VS. THE NEW ORLEANS WATER WORKS COMPANY.

SYLLABUS.

1. Where a private corporation, created under State law, misuses the franchises conferred upon it, with respect to matters which are of the essence of the contract between such corporation and the State, and the acts, or omissions, complained of, are wilful and repeated, and inflict injury upon the public, generally, they constitute just ground for the forfeiture of such franchises and the dissolution of the corporation.
2. The charter of the defendant company, being Act No. 33 of 1877, Extra Session, as amended by Act No. 43 of 1878, prohibits said company, in express terms, from charging higher rates for the water to be supplied by it than were charged by the City of New Orleans at the date of the passage of said act of 1877; and, as the evidence adduced in this case shows that the defendant has wilfully and persistently disregarded this prohibition, its charter and franchises are declared forfeited.

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ON APPLICATION FOR REHEARING.

1. A private corporation, upon which has been conferred the exclusive privilege of supplying water to a large community for a number of years, upon condition that its charges shall not exceed those paid to the municipal corporation which preceded it in control of the works, and which is vested with possession and control of the books of the municipal corporation in which those charges are recorded, should preserve such books in safety, and failing, satisfactorily, to account for them, must be held guilty of negligence, and can derive no advantage from their loss.
2. In a suit by the State to have decreed forfeited the charter of such corporation for the violation of its prohibitions and the non-fulfillment of its obligations, records in suits, litigated between the corporation and members of the community affected, in which such violations and non-fulfillment, *quoad* the individual litigating, have been judicially ascertained and determined, are admissible in evidence as against the defendant.
3. So, also, the testimony of a witness given upon the trial of such a suit, between the corporation and a member of the community affected, may be admitted in evidence for the purposes of the suit brought by the State, though the witness, when placed on the stand, is unable to identify the type-written instrument purporting to contain such testimony, and, by reason of the lapse of years and advancing age, is unable to recall the facts to which he formerly testified, *provided*; that the instrument is otherwise identified as containing the testimony which had been given by the witness and the witness affirms that such testimony was true when given.

A PEAL from the civil district court, parish of Orleans—*Theard, Jr.*

Walter Guion, Attorney General (*Benjamin Rice Forman*, of Counsel), for Plaintiff, Appellant.

Farrar, Jonas & Kruttschnitt, James R. Beckwith, and *E. Howard McCaleb*, for Defendant, Appellee.

Samuel L. Gilmore, City Attorney, *Arthur McGuirk*, Assistant City Attorney, for City of New Orleans, Intervenor, Appellant.

Branch K. Miller, for Board of Liquidation, Intervenor, Appellee.

On the application for rehearing by *MONROE, J.*

Removed to Supreme Court of the United States on writ of error.

STATEMENT OF THE CASE.

The opinion of the court was delivered by
MONROE, J. In 1898, the General Assembly adopted two concurrent

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resolutions, which, by the approval of the Governor, became Acts Nos. 5 and 150, respectively, of the session of that year. Act No. 5 provides for the appointment of a legislative committee to investigate certain complaints against the New Orleans Water Works Company, and Act No. 150, after referring to the majority and minority reports, which had been made by the committee so appointed, and after a recital to the effect that said reports involve intricate questions of law and of fact, which it is impossible, for lack of time, for the General Assembly to determine, provides: "That the whole subject matter of said reports, together with the testimony and evidence upon which they are based, be respectfully referred to the Attorney General of the State, for such action in the premises as he may deem proper." Thereupon, in January, 1899, the Attorney General brought this suit, in the name of the State, praying, for the reasons set forth in the petition, that all the franchises of the said waterworks company be declared forfeited. or, in the alternative, that said company be decreed to have abandoned the monopoly, claimed and enjoyed by it, of furnishing water to the city of New Orleans and its inhabitants.

In the suit thus filed, the City, and the Board of Liquidation, of the City Debt intervened, the one, joining in the prayer of the plaintiff, and the other, in that of the defendant. Both interventions were, however, dismissed, by the judge *a quo*, and the Board of Liquidation has taken no appeal. So that, the case with which we are called upon to deal is that between the State, the City and the defendant company, upon appeals, taken by the State and City from judgment rejecting their demands. The charges upon which those demands are predicated are, in substance; that the defendant has not complied with the obligations imposed by its charter with respect to the quality and quantity of water to be furnished; that it has violated certain provisions of said charter concerning the charging of rates for water, the payment of dividends, the sale of its stock, and the borrowing of money; and that it has abused its franchises by unjust discrimination in the rates charged. It is also alleged that the defendant has accepted the benefit of Act No. 56 of 1884, and has, thereby, and in any event, abandoned its monopoly. It is further claimed, in argument, and the question was passed on by the judge *a quo*, that the act incorporating the defendant is unconstitutional, because of the failure of its title to disclose the granting of said monopoly.

It appears from the record that, in 1833, the Legislature created a

corporation called the "Commercial Bank of New Orleans," the main purpose of which, as declared by its charter, though it was also vested with banking privileges, was to supply the city and the people of New Orleans with "water from the Mississippi river." The capital stock of the corporation was fixed at \$3,000,000 (of which the city took \$500,000), and the period of its existence at thirty-five years, with a *proviso* to the effect that, at the expiration of its charter, the city should have the right to purchase the plant, at a valuation to be determined by appraisement, and to pay for the same in bonds. The act contemplated that the water to be furnished should be obtained from the Mississippi river, and, in general, that it should be delivered as so obtained, but there was a clause reading, "and the said company shall supply a sufficient quantity of clear, pure and wholesome water for the use of the inhabitants, within the limits aforesaid, at the elevation of fifteen feet, when the same may be required" (Acts of 1833, p. 167, Sec. 38), from which it appears that the obligation was imposed upon the company to free the water of the material usually carried by it in suspension when specially so required by consumers. It does not appear, however, that during the thirty-five years of its existence any such requisition was made, or that the company ever furnished any other water, either to the city or its inhabitants, than the water of the river, as taken therefrom. In 1868, upon the expiration of its charter, the tangible property of the company, including lands, buildings, machinery, reservoirs, etc., was appraised, for the purposes of the sale to the city, at \$2,000,000, which was, probably, twice or three times its value, but, as the price was paid in bonds which were worth much less than *par*, the profit to vendors was not so great as it would, otherwise, have been. The City, moreover, was a stockholder, to the extent of \$500,000, and had to her credit, in the hands of the company, \$106,800 of dividends which had been, from time to time, declared, and, these two amounts being deducted from the price, she issued her bonds for the balance, amounting to \$1,393,400; and, in January, 1869, the property was turned over to her and placed under the control of a Board of Commissioners and a Superintendent, appointed by, and acting under the authority of, the Mayor and Council. During the city's administration, which lasted from January, 1869, to April, 1878, the propriety of improving the quality of the water was constantly recognized, and various reports and suggestions upon the subject were made, but nothing was accomplished.

The works were, however, extended, and, when turned over to the defendant now before the court, in April, 1878, consisted, so far as facilities for distributing the water were concerned, of sixty-three miles 1794 feet of main pipes, of different dimensions. The question of the tariff of charges was also much considered by the city authorities, and, eventually, with more decisive results than followed upon their deliberations concerning the quality of the water. The Board of Commissioners, apparently before the works actually came into the possession of the City, had adopted a schedule, which has since been known as the "Hatch" tariff, no doubt, because promulgated over the signature of F. H. Hatch, as president *pro tempore* of said board. and the charges for water were regulated thereby immediately upon the City's acquisition of the works, and for some time thereafter. As early as February, 1869, a committee, appointed by the Board of Assistant Aldermen to look into the matter, made a report, in which they said: "Your committee on water rates, to whom was referred a resolution directing them to report a table of rates for water rents, have examined the rates now being charged and collected by the Board of Commissioners of the Water Works, and find them entirely too high, and a cause of general complaint among consumers of water. These rates are considerably higher than in many other well regulated cities." This was followed by a statement showing that in Cincinnati and Louisville the charges for water, furnished in large quantities, and by measurement, was 15 cents per thousand gallons, and in Chicago from 10 to 15 cents per thousand gallons, whilst the rates under the Hatch tariff were from 25 to 40 cents per thousand gallons, for water so furnished. And those rates were quite moderate, as compared to the "flat" rates charged to the small consumers. The Board of Commissioners, it appears, had endeavored, by the introduction of meters, to equalize this taxation, and, in April, 1869, General Bragg, the then superintendent of the works, reported upon the subject, in part, as follows, to-wit: "You are presented herewith with an abstract of the measurements of water delivered in the first quarter of this year by meter. * * * The results are so remarkable and extraordinary as to induce me to ask your special attention and scrutiny. They go to show the entire correctness of the principle on which you established your rates, viz, to make them uniform, and, though the result is not yet satisfactory, the small consumer still paying too much in proportion, you have made a long stride in the right direction. A few more

applications of the meter, now being made, will enable you to do full justice to all parties. * * * The large distillery, for instance, which received its water last year at two and nine-tenths cents per thousand gallons, now pays twenty cents for the same supply. *Per contra*, the poor laborer, or widow, who paid ninety cents last year, now gets the same allowance for forty cents. The large steam bakery, which paid only eighteen cents, last year, whilst his small neighbor paid eighty, is now put on an equality with the latter, the one being put up and the other put down to a medium. But the greatest contrast is to be found in the larger establishments. In the three large sugar refineries, one paid four and seven-tenths cents per thousand gallons, another, three and two-tenths cents per thousand gallons, and the third, and largest, one and four-tenths cents per thousand gallons. Here was a discrimination of more than three hundred per cent. against one man, in favor of another, engaged in the same commercial business."

"Just 15 per cent. of all the water that is paid for is taken now by five large consumers. Yet they have, heretofore, paid only 2 per cent. of the revenues. * * * The working of the meters, so far, goes to show that still further reduction may hereafter be made in the water rates, but, in justice, that reduction should inure almost entirely to the small consumer, until he is brought nearer an equality with his more fortunate neighbor." The committee appointed by the Council, nevertheless, as we have seen, found the Hatch tariff too high, and they recommend the adoption of a tariff, prepared by them, reducing the charges to about the rates established in the cities mentioned. And such a tariff was adopted by the Council, but was vetoed by the Mayor, and was, in March, 1870, passed over the Mayor's veto. Very soon after this action had been taken, the President of the Board of Commissioners addressed a communication to the Mayor and Council, in which, referring thereto, said: "As this tariff is to be put in operation when officially promulgated, the Board of Directors of these works have directed me to call your attention to the serious difficulties which must arise in its operation." He then called attention to the fact that, in December, 1869, a tariff (being the Hatch tariff) had been adopted, for the year 1870, upon the basis of which tariff, all the bills for the ensuing year had been made, and sent out, and that more than one-half of such bills had been paid; and he asked the following questions concerning the proposed new tariff, viz:

"1. Shall it go into effect immediately? 2. Is it to have any retroactive effect? 3. If retroactive, does it work a change of bills not paid, only, or does it apply to those already paid? 4. As the money collected under the present tariff had already been appropriated by you to pay interest on the waterworks bonds, how can it be Aldermen, March 15, 1870, up to which time, it is quite evident, the ordinance establishing the new tariff had not been promulgated. Upon the following day, March 16, 1870, the Governor of the state approved the Act No. 7, of the Extra Session of 1870, establishing a new form of government for the city of New Orleans, the concluding section of which provided that it should take effect from and after its passage. And nothing was thereafter done with the tariff ordinance, the evidence in the record being conclusive to the effect that it was never promulgated. Under the new city charter, the control of the waterworks was vested in an "Administrator of Water Works and Public Buildings," and the record contains the report of the first of the officers so designated, and also of the last. We learn from these reports, and from other evidence in the record, that, during the year 1868 (being the year preceding the acquisition of the Water Works by the city), there were pumped a total of 2,227,000,000 gallons of water, for which there were received \$155,023.75, or an average of about 69.6 cents per 1000 gallons. What amount of water was pumped during 1869, the first year under the city's administration and under the Hatch tariff, the record does not show, but the receipts amounted to \$143,293.00. During the year ending in May, 1871, there were pumped 2,101,015,000 gallons, for which the city received, under the Hatch tariff, \$148,064.91, or an average of about 70 cents per thousand gallons. From that time, although the record does not show the quantity of water pumped during the several succeeding years, the falling off in the receipts indicates that the Hatch tariff was abandoned, and that the charges were being reduced below the rates thereby established. Thus, the receipts for 1872 were \$132,626.82; for 1873, \$125,904.17; for 1874, \$113,146.61; for 1875, \$100,742.01; for 1876, \$90,015.67. During the year 1877 (being the last year of the city's administration of the works), there were pumped 2,408,591,230 gallons of water, and we find it stated in the report made by the president of the defendant company to his board of directors that the receipts for the year were \$90,148.62, or an average of something over 37 cents per

thousand gallons. So that, between the second and the last years of the City's administration, there was a difference of more than 40 per cent. in the average amount received per 1000 gallons of water pumped, and a corresponding difference in the total receipts. That the City, in 1870-1871, collected for all the water pumped by it, including the free water furnished, an average of 70 cents per 1000 gallons, whilst the maximum rates under the Hatch tariff, was 40 cents per thousand, is to be accounted for by the fact, that the flat rates charged to the small consumers were enormously in excess of those predicated upon measurement, charged to the large consumers. Upon the other hand, the fact that the city, in 1870-1871, under the Hatch tariff, received \$148,046.91, for a total of 2,101,015,664 gallons of water pumped, whilst, in 1877, she received but \$90,148.62, for a total of 2,408,591,230 gallons pumped, amounts, almost, to a demonstration that the Hatch tariff had been abandoned. There is, however, further, direct, evidence, to the same effect, which will be more particularly referred to hereafter. The net receipts for water rents, under the city's administration, over and above the expense of maintaining, extending and operating the works, appears to have been devoted to the payment of interest on the bonds which had been issued in liquidation of the purchase price of said works, and the amount required to pay such interest, on all the bonds so issued, was \$69,620.00. When, therefore, the total receipts fell to about \$90,000.00, as they did in 1876, whilst the expense of maintaining and operating the plant was not far short of \$60,000.00, it can readily be understood that the position of the holders of water works bonds was far from satisfactory. Under these circumstances, it seems not improbable that the General Assembly was induced to take action in the matter as a measure of relief to the holders of such bonds, though there is no direct evidence to that effect in the record. Be that as it may, in March, 1877, an act was passed (being Act No. 33 of 1877) entitled "An act to enable the City of New Orleans to promote the public health and to afford greater security against fire, by the establishment of a corporation, to be called the New Orleans Water Works Company; to authorize the said company to issue bonds for the purpose of extending and improving the said works, and to furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water; to permit the holders of water-works bonds to convert them into stock, and to provide for the liquidation of the bonded and floating debt of the city of New Orleans."

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The provisions of this act, so far as it is necessary to refer to them, are, substantially, as follows, to-wit:

Section 1, fixes the capital stock at \$2,000,000, divided into 20,000 shares of \$100 each.

Section 2, requires that, upon the organization of the company, certificates representing the whole amount of the stock shall be turned over to the city to be disposed of as follows, to-wit: (1) \$806,800.00 to be retained as the property of the city (this it will be remembered being the amount of the city's interest, upon the basis upon which it purchased the works from the old company); (2) the city further to retain one share of stock for every \$100 of waterworks bonds which it may have extinguished by payment, exchange, or otherwise; (3) The residue of said stock to be held by the city for the benefit of the holders of such bonds, still outstanding, and exchanged for the same on the basis of one share of full-paid stock for every \$100 of bonds, exclusive of the value of the overdue coupons

Section 3, provides that, whenever the holders of such outstanding bonds, to the amount of \$500,000, shall have exchanged the same for stock, a board, consisting of seven directors, shall be elected, of whom, four shall be named by the Mayor, and three, elected by the stockholders other than the city, the board thus elected to hold office until July 1, 1878.

Section 4, provides for the transfer of the works by the city to the new company.

Section 5, confers upon the company the privileges acquired by the city from the Commercial Bank, and further provides that said company "shall have, for fifty years from the passage of this act, the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi river, or any other stream, or river, by means of pipes and conduits," authorizes the company to purchase, lease, and enter upon, lands, dig ditches and canals, and construct such dykes, reservoirs and other works "as may be required for securing and carrying a full supply of pure water to said city and its inhabitants," etc., etc.

Section 6 provides, that, upon the first Monday in July, 1878, and annually thereafter, four directors, shall be elected, by all the stockholders, and that the Mayor and the Administrator of Water Works and Public Buildings and the Administrator of Finance, shall be *ex officio*, members of the board.

Section 8, provides, that the capital stock may be increased to two million dollars, for the purpose of enabling the company to improve and extend its works, the new stock to be paid for in cash, or in work.

Section 9, authorizes the company to "borrow money for the purpose of improving and enlarging its works, and increasing the supply of pure water," and, to that end, to issue bonds to an amount not exceeding \$2,000,000, secured by mortgage on the property of the company, such bonds to be issued and sold, and such mortgages given, only with the consent of the city council.

Section 10, provides, "That said company shall not declare or pay any dividends except in cash, and then only out of the net *semi*-annual, or annual, receipts, after payment of the expenses of operation and the interest on its bonded debt, nor shall any dividends be declared until the contemplated works are completed and in use."

Section 11, provides, that the city shall have the free use of water, for the extinguishment of fires and for other public purposes, and that the company "shall place, free of any charge whatever, two hydrants, of the most improved construction, in front of each square where a main pipe shall be laid, from which, a sufficient quantity of water may be conveniently drawn for the extinguishment of fires and for other public purposes * * * and, in consideration thereof, the franchises and property of the said New Orleans Water Works Company, used in accordance with this act, shall be exempt from taxation, state, municipal and parochial."

Section 12, confers upon the company the right to expropriate private property and to appropriate, and use, public property.

Section 13, reads: "That the said Water Works Company, immediately after its organization, shall proceed to the erection of new works and pipes, sufficient in capacity to furnish a full and adequate supply of water, to be drawn from the Mississippi river, or elsewhere, as may be judged most expedient; that said new works and pipes shall be commenced within twelve months from the passage of this act, and shall be, year by year, completed, so that, within five years from the passage of this act, they shall be completed so as to give an adequate supply of water to the people of the city of New Orleans, exclusive of the Fifth District. If the said work be not done as above prescribed, said corporation shall forfeit all exclusive privileges granted herein, and the city shall have a right to contract with any one else for a supply of water, as above provided, and to expropriate the prop-

erty of the corporation hereby created. After the completion of the new works and pipes, the new company shall, from time to time, as the wants of the population may require, and when the estimated revenue upon the cost of such extension shall equal ten per centum, extend their works throughout the entire limits of the city and suburbs, and any future extension of said city; and any failure of said waterworks company to comply with this provision shall work a forfeiture of this charter.

* * * * *

Section 15, provides, "That the said waterworks company shall have the right to fix the rate of charges for water, provided that the net profits of the company shall not exceed ten per centum per annum; and shall publish *semi*-annual statements of its business and condition; and that the city council shall have the power to appoint a committee, of not less than five, who shall have access to the books of said company, and make such extracts from the same as they may deem necessary, and, in case the said profits shall exceed ten per cent, the city council shall have the right to require said company to reduce the price of water in such manner, and in such proportion, that the profits shall not exceed the above named rates; and *provided further*, that the rates charged shall never exceed the rates now paid by" (to) "the city, and in case said company shall refuse compliance, the demand of said city may be enforced by the writ of mandamus."

Section 16, makes it a criminal offence to obstruct the company or its agents in conveying water to the city, or to injure the works, or to pollute the water."

Section 17 provides, "That until other works are constructed by which the present works may be dispensed with the same shall remain under the control of the city council, and the superintendence thereof remain in the hands of the Administrator of Water Works and Public Buildings, but the said company shall be authorized to collect the revenues thereof and apply them to the expense of operating and extending the works." And it is further provided, that the city shall have the right to buy the works of the company at the expiration of its charter.

Section 18 provides, "That nothing in this act shall be so construed as to prevent the city council from granting to any person, or per-

"sons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his own use, or their own use."

This statute failed of its purpose, and, in 1878, the General Assembly passed Act No. 43 of that session, entitled "An act relative to the charter of the New Orleans Water Works Company, amending Act No. 33 of Extra Session of 1877, approved March 31, 1877," which amends the act of 1877, in the following particulars, to-wit:

Section 1 provides, that four out of the seven directors shall be elected by the stockholders, other than the city.

Section 2, amends and re-enacts section 10 of the act of 1877, so as to make it read: "That said company shall not declare any dividends except in cash, and then only out of the net *semi*-annual, or annual receipts, after payment of the expenses of operation, and gradual extension and the interest on its bonded debt."

Section 3, amends section 17 of said act by eliminating the *proviso* whereby the city is authorized to retain control of the present works until other works are constructed.

Section 4, provides, that the delay for beginning the erection of new works, shall begin to run six months after the organization of the company, instead of twelve months after the passage of the act of 1877, as provided in that statute.

Section 5, reads: "That the full, complete and adequate supply of water, referred to in section 13 of said act, No. 33 of 1877, shall be so construed as to require a supply of water at the height of not less than fifteen feet from the ground, wherever the pipes of the water works now exist."

Section 6, withdraws the exemption, in so far as State taxation is concerned.

Under the act of 1877, then, as thus amended, the defendant company was organized, and, upon March 30th, 1878, elected its first board of directors. Upon April 9th, following, the city, by notarial act, transferred to it the entire water works property and plant. It appears from the recitals of this act that the stock of the company was then distributed as follows, to-wit:

1. Amount of full-paid stock, subscribed for by the city
as per the terms of the act of 1877.....\$ 606,600 00
2. Amount issued to the city on account of Water
Works bonds funded in premium bonds 451,400 00

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3. Amount issued to the city for Water Works bonds redeemed	111,500 00
4. Amount issued to holders of Water Works bonds, in exchange therefor	501,600 00
5. Amount reserved for the benefit of the holders of such bonds, still outstanding	328,900 00
Total	\$2,000,000 00

The evidence shows that the bonds in question, and the stock for which they were exchanged, were, at that time, worth 33 cents on the dollar. It further shows that, in April, 1879, one year after going into business, the company, upon a basis of \$99,717.92, received for water rents, declared a dividend of 2 per cent upon the par value of its stock, amounting to 6 per cent. on the money actually invested, and that, besides adding largely to the extent and value of its property, it has, from that time to the present, with the exception of one year, paid dividends, amounting, for some years past, to five per cent. per annum, upon the par value of its stock, or about fifteen per cent. on the original investment, and that as a consequence the stock has been sold as high as 128, and, in exceptional cases, even higher, and was quoted considerably above *par* during the trial of this case in the district court.

The company, whilst, apparently, holding that it is under no compulsion to furnish clear, or pure, water, at any time during the fifty years of life which it has received, nevertheless, seemed, for a while, to consider that some sort of obligation rested upon it in the premises; and its officers, from time to time, have made reports in which they have recognized the fact that the water, as actually furnished, is unfit for most purposes for which water is used, and have expressed a desire to do something to alleviate the situation. But, for reasons given, which are not always reconcilable, nothing has been accomplished in that direction, and, so far as we are informed by the record, nothing is likely to be accomplished during the life of the defendant's charter. In the first report, of the first president, made to the directors in 1879, he said:

"Although the water delivered to consumers is heavily charged with sediment, my first study was devoted to supplying an abundance, such as it is, leaving the problem of clear water to be solved after this has been accomplished. The delivery of filtered water from the

"Mississippi river is an acknowledged possibility, through subsidence and filtration, but the expense attendant thereon must deter us from adopting this system at present."

The following year, according to the report of the same officer, provision had been made for the "abundance" to which he referred in his previous report, but the expense still stood in the way of any action toward improving the quality of the water. And the same condition was reported in 1881, and 1882. A new president was then installed, but, in the meanwhile, a litigation had arisen between the city and the company (involving the question of the liability of the company for taxes, on the one hand, and of the city for its water supply, on the other), the pendency of which seemed to operate as a bar to any steps in the direction of better water, the president reporting upon the subject, in April, 1884, as follows, to-wit:

"It is feasible and practicable for our company to supply the city with crystal clear water. Experiments, conducted by Mr. L. H. Gardiner, during the past eighteen months, have demonstrated, to the satisfaction of the directory, the practicability of thus clarifying the water of our river and of thus supplying our people with a water inferior to none, and superior to most public supplies, from whatever source derived. Settling reservoirs adapted to this system have been designed by Col. Cook, to be erected on grounds already owned by the company. Their cost, and that of the machinery, etc., is entirely within the limits of prudent investment for such a purpose. If the relations of the company to the city can be equitably determined, and the letter and spirit of the charter of the company fairly construed by the courts, in the now pending litigation, I shall strongly advocate the adoption of the system for a clear water supply above alluded to, to be furnished, of course, at our present tariff rates. As matters now stand, the city is the beneficiary of our company to the extent of about half of the water we pump, and wants to exact, additionally, the payment of a large assessment for taxes. Pending these conditions, I do not recommend any improvement or expenditure beyond what may be necessary for the maintenance of our present system." The litigation thus referred to, eventually, resulted most favorably to the company; for, whilst it was held that the company was liable to the city for taxes, it was also held that the city was liable for all water furnished exceeding in value the amount of such taxes, collected, the result being, that, between 1884 and 1898, the

city collected \$290,239.86, in taxes, and paid for water, which, by the terms of the company's charter was to have been furnished free, the sum of \$931,191.26, making a difference of \$640,951.40 in favor of the company, as compared with the result if both parties had conformed to the provisions of the charter as written. Nothing, however, has since been accomplished by the company in the way of improving the quality of the water furnished by it. Some years after the termination of the litigation above referred to, another corporation, engaged in the business of supplying filter plants, was allowed to make the experiment of pumping Mississippi river water through its filters directly into the defendant's distributing mains, with the understanding that should the experiment demonstrate the practicability of furnishing pure water. in that way, the defendant should pay for the plant erected for its purposes, and should, in any case, pay the actual cost of the experiment; and, the attempt proving unsuccessful, the company paid the cost, amounting to \$25,000. In the meanwhile, the settling reservoirs, so frequently and confidently reported on, and by means of which, in 1884, the president assured the directors that crystal clear water cou'd be supplied "within the limits of prudent investment," have never been constructed, and all further effort on the part of the company to furnish pure water has been abandoned, to await the result of experiments which may be made, elsewhere.

In this connection, it is perhaps proper that we should state more distinctly the conclusion which we have reached, from the evidence before us, as to the character and availability, for ordinary purposes, of the water of the Mississippi river, as taken from that stream and supplied to the people of New Orleans by the defendant company. In a report made by the defendant's able superintendent to its president and directors, in April, 1888, that officer said: "The silt, or suspended matter, carried by the Mississippi river varies from sixty grains to fifteen hundred grains of solid matter per gallon. The character of the silt is such as to rapidly cut and wear the working parts of all machinery." "Silt" is defined to be "mud, or fine earth, deposited from running or standing water." (Webster's International Dict.) It is also shown that the suspended matter referred to consists, in part, or, at times, of "kaoline," a finely-divided white clay, and that the result of the admixture of silt, kaoline and water, is, in this instance, a tawny, opaque, fluid, which is not only injurious to machinery, but is undesirable for any, and totally unfit for most.

domestic uses—even the washing of banquettes or the scrubbing of floors. Upon the other hand, it is conclusively shown that, when the material that is carried in suspension is removed, whether by precipitation or filtration, the water becomes clear, and is uncommonly pure and wholesome, the reason therefor being, that for several hundred miles above New Orleans there is no surface drainage, the source from which streams derive most, if not all, of their organic matter, into the Mississippi river, and that such matter, of that description, as may have been swept into it, higher up, is eliminated during the passage of the water over that distance, by constant agitation and attrition in contact with the inorganic substances, carried in suspension, and with the oxygen of the atmosphere. A large percentage of this inorganic material is, however, left behind, and, whilst it is said by some of the witnesses that the water is none the less palatable and wholesome on that account the weight of the evidence is the other way, and we find nothing in the record to justify the conclusion that any one in New Orleans, habitually, drinks river water with its mud in it, or that a fluid that is capable of destroying machinery, made of iron or steel, can, with impunity, be taken, as a beverage, into the human system. The evidence, taken on behalf of the defendants, shows that, whilst Mississippi river water is highly esteemed by mariners visiting this port, it is not so used, the same witness who testifies that it is considered the “finest in the world for sea-going purposes,” also says: “We always used to settle it before stowing it for sea-going purposes.” Our conclusion, then, may be summarized in the following excerpt taken from a report made by one of the defendant’s presidents to its board of directors, in April, 1882, to-wit: “Dr. Joseph Jones, in his able report of 1881, says, that in the year 1870, samples of the waters “of the Mississippi river were submitted to him for chemical and “microscopical analysis, and from his examination, he concluded that, “when freed from superficial matter, they are of great purity and will “compare favorably with the drinking water supplied to the largest and “best regulated cities.”

Upon the question of what was done by the defendant, within the limit of time fixed by its charter, to extend its works and furnish a supply of water, adequate, as to quantity, a great deal of testimony was taken, the consideration of which, for reasons which will sufficiently appear hereafter, we pretermitt. And we now proceed to an examination of the facts, as disclosed by the record, touching the rates

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charged by the defendant and its alleged discrimination between consumers.

We have seen that the ordinance, passed by the city council in 1870, proposing lower rates than those established by the Hatch tariff was never promulgated, and we have also seen that it is practically demonstrated that the Hatch tariff was, nevertheless, abandoned by the city, and a much lower rate adopted, long before the transfer of the waterworks to the defendant. It is not improbable that the tariff, as thus adopted and enforced by the city, during the last few years of its administration of the works, conformed, in the main, though not altogether, to that embodied in the unpromulgated ordinance of 1870; but, of this we cannot be sure, as the most important books, showing the charges and collections made by the city, have been lost; the defendant, to whom they were delivered, with the works, and who had possession of them for several years thereafter, being now unable to account for them. Taking the evidence as we find it, it appears that, during the first four years of the defendant's administration, the proviso contained in Section 15 of the act of 1877, which reads; "*and provided further, that the rates charged shall never exceed those now paid by*" (to) "the city," etc., was construed to mean that the company should not charge more for water than was charged by the city, before, and at the date of, the transfer of the works; and during that period, the charges were regulated accordingly. Such is the positive, uncontradicted, testimony of the gentleman who, during those years, occupied the position of president of the defendant company. And his testimony is corroborated by the figures, which we find in the record, showing the quantity of water pumped and the receipts from the sale of the same, as compared to the pumpage and receipts under the city administration. We will not go over these figures in detail. It is sufficient to say that the average receipts from water rates during the last five years of the city's administration were \$98,513.23, and the average receipts during the following four years (being the first four years of the company's administration) were \$93,601.95, whilst the evidence points strongly to the conclusion that the company pumped more water during that time than had been pumped by the city. The record does not show how much was pumped during the years 1874, 1875 and 1876, but it appears, as has, heretofore, been stated, that, in 1877, the city pumped 2,408,591,230 gallons, for which she received \$90,148.62; and it also appears that during the year ending in April, 1882, (being

the last year of the company's first four years of administration), there were pumped 2,948,347,134 gallons for which the company received \$99,930.70, the average, per thousand gallons, received by the city being 37.4 cents, and the average received by the company being 33.8 cents. That the company received less than the city, though pumping more water, is accounted for by the fact that there had been a large waste, resulting from leaks in the reservoirs, amounting, according to the estimate of the president of the company, to 600,000 gallons per day. The financial results thus obtained were unsatisfactory to the stockholders, who, in 1882, elected a new president. And the evidence justifies the conclusion that the company, then, deliberately, abandoned the tariff of charges for water which had been enforced by the city, and by which it had, theretofore, regulated its own charges, and established a new tariff, according to which the rates were much higher. There was little or no noise made about this change of policy, but the results were soon to speak, and have spoken, for themselves. During the year 1883, the company pumped 2,900,549,214 gallons of water, as against 2,948,347,134 gallons the year before, and received \$111,794.19 as against \$99,930.70, received the year before; thus pumping nearly 50,000,000 gallons less water, and receiving nearly \$12,000 more for it. And the president, in his annual report, used the following language, to-wit:

"The earnest attention of the directory has been engaged in plans for an improvement in the character of the water we furnish; to an improvement and reorganization of the system of records and general conduct of current business; *to the maintenance of a proper and reasonable advance in the great majority of the assessments*, and their equalization. * * * The assessments, (which seem to have been governed by no fixed rule), when compared with the tariff, have been found too low. Correction, increase and equalization have created more or less dissatisfaction. *An increase has been established, however, and the company is still far within the limits of its authorized tariff.*" (Italics by the Court.)

In April, 1884, the president reported that he had caused the premises of each consumer to be inspected, and he, thereupon, proceeded, as follows, to-wit:

"The systematic inspection alluded to gave data and basis for a material increase in the general assessment. Special care has been taken to have all the assessments fall within the limits of our author-

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“ized tariff, and at the same time bear an equitable relation to each other in the various classes of water takers. * * * The people of New Orleans have proved willing, after a little natural remonstrance, to pay a fair price for water supplied by the company, as is shown by the fact that the collected revenue is \$17,000 above that of the preceding year.”

During the year to which this report referred, the company pumped 2,759,022,884 gallons of water for which it received \$127,228.50, being an average of 45.7 cents per thousand gallons. During the year ending in April, 1885, the company pumped a total of 2,442,611,478 gallons, for which it received, from private consumers, \$129,876.08, and from the city of New Orleans, \$17,085.60. Averaging the total amount of water pumped by the amount received from private consumers, only, and we find the charge to have been 53 cents per thousand gallons; whilst, if we include in the calculation the amount received from the city, the average charge per thousand gallons was 59 cents. During the year ending in April, 1886, the company pumped 2,169,399,232 gallons of water, for which it received, from private consumers, \$123,228.73, and from the city, \$64,239.60. Averaging the total amount of water by the amount received from private consumers, only, and the charge amounted to 56 cents per thousand gallons, and if the amount received from the city be included, the average charge, per thousand gallons, was 86 cents. It will thus be seen that, within the four years following its change in policy, the company, upon the face of the reports made by the president to its board of directors, had raised the average charge for water, per 1000 gallons, about 50 per cent above the rates previously charged by the city, in 1877, and that, including the amount received from the city, the company received an average of nearly two and a half times as much per thousand gallons, for water pumped in 1886, as the city received in 1877. During some later years, a comparison of the gross pumpage with the gross receipts may not, always, disclose the same high average, but this was not because the charge was not made, but for other reasons; as, for instance, in January, 1892, the superintendent reported that the record showed that the company pumped 100,000,000 of gallons more in November, 1891, than in November, 1888, whereas the extra quantity was neither pumped nor delivered, but was registered by reason of the defective condition, and “slippage,” of the pumps. When that condition began, and how long it lasted, it would be useless to inquire. The facts which have been

stated are sufficient, more particularly when considered in connection with the testimony to which we will refer a little later. What the president of the defendant company meant when he stated that the charges for water, established and enforced by the company, were "within the limits of its authorized tariff," the record does not enable us to say. It is quite certain that those charges did not, and do not, fall within the limits of the tariff established by the city, and in force when the charter of the company was adopted, as is shown by the books of the city which were delivered to the company, and served as its guide in the matter of its charges during the first four years of its existence; and if any other tariff was authorized, evidence of that fact has not been produced. The "dissatisfaction," to which the first report refers, resulted in something more than "the little natural remonstrance," mentioned in the second. Isaac Levy, a rice miller, had been paying \$150, *per annum*, for his supply of water, under the city administration, and his rate had been increased to \$175 upon the accession of the company, to which he made no objection, as the latter amount was within the tariff established by the city. In 1883, however, the company, under its new administration, increased the charge to \$400, whereupon Levy filed suit, complaining that the charge was illegal and praying that the company be compelled to accept the amount to which it was entitled, and that it be enjoined, in the meanwhile, from cutting off his supply of water. And it was finally decided, in 1886, that the company was entitled to charge no higher rate than the city had charged upon March 31st, 1877, (the date of the approval of the Act No. 33 of that year); that the rate then charged by the city, to consumers such as Levy, was fifteen cents per thousand gallons, and that the amount demanded by the company was in excess of that rate, and, therefore, unauthorized and illegal. *State ex rel. Water Works Co. vs. Levy*, 38 Ann. 25. The judgment thus rendered was affirmed, in 1887, in the case of *Ernst vs. Water Works Co.*, 39 Ann. 550; and suits brought by several other litigants, and not appealed, appear to have been settled upon the same basis. Upon the trial of the Levy case, the president of the company, who had administered its affairs during the first four years, testified that, during that time, the rates charged by the company had been regulated by the rates as he found them in the books of the city; and that the rate charged by the city, for water furnished in quantity and by measurement, was 15 cents per 1000 gallons; and he referred the counsel of the company to the books

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of the city, which were then in the possession of the company, in verification of his statement. Whether the books were then produced in court, we are unable to say from the record now before us. If they were, the result shows that their contents sustained the testimony of the witness. If they were not, it is fair to presume that it was because the company, though in possession of them, did not find it to its advantage to produce them. Since that time, the books have been lost, and as the memory of the witness who then testified as to their contents has become somewhat uncertain, after the lapse of years, it would be difficult, perhaps impossible, now, to prove what rates were charged by the city in 1877, and the defendant would have a wide latitude in the matter of its charges were it not that the testimony given in the Levy case has been preserved and affirmed by the witness who gave it. After having had its day in court, in the several cases referred to, the defendant, apparently, acquiesced in the result reached, and, as late as November, 1890, the superintendent, in his monthly report to the president and directors, referring to a controversy which had arisen with a large consumer, informed them that he had consulted the attorney of the company as to the rate per thousand gallons that could be charged, and that, quoting the language, "he says that 15 cents per 1000 gallons "having been fixed by the Supreme Court as the legal rate to charge "consumers, this is the rate under the circumstances. I have rendered "a bill in accordance, etc." He also, in the same communication, recommended that certain other consumers, whom he names, should be charged at the same rate. But there were, and are, still other large consumers who were, and are, charged rates greatly in excess of that obtained by those with whom the controversy had arisen, rates in conformity to a tariff published by the company itself, and to which its president, presumably, referred, in speaking of its "authorized" tariff, but which fixes 15 cents per 1000 gallons as the minimum rate to large consumers, taking water by measurement, whilst the maximum rate to such consumers is 35 cents per 1000 gallons.

These rates conform neither to the Hatch tariff nor to the tariff contained in the unpromulgated ordinance of 1870, and they are largely in excess of the tariff enforced by the city in 1877; and, so far as this record discloses, there is no other authority for them than that of the company itself, exercised in plain disregard of two decisions of this court, rendered in cases to which the company was a party, to the effect that they are unauthorized and illegal. Beyond this, we find, in

the pamphlet containing the tariff thus published by the company, the following rules prescribed to consumers of water, to-wit:

"Meters will be of such make and size as will be approved by the Water Works Company, and will be furnished and maintained by the consumer. * * * The furnishing of water through meters will be at the option of the Water Works Company." We also find that such meters as are permitted and approved by the Water Works Company, whilst quite expensive (those of medium size costing in the neighborhood of \$40), are rapidly cut and worn out by the action of the silt-bearing water, and that there is, consequently, great irregularity in their operation, so that one consumer, whose meter registers 1000 cubic feet, is charged with 7500 gallons of water, whilst another, whose meter registers the same quantity, may be charged with from 10,000 to 90,000 gallons, or any other quantity. And this, too, at the rate of 35 or 40 cents per thousand gallons, as against 15 cents per thousand gallons charged to the consumer whose meter measures only seven and a half gallons to the cubic foot. Thus, by way of illustration, a particular consumer, during a period of twenty-seven months, using an average of 730,000 gallons of water per month, was charged at the uniform rate of 15 cents per 1000 gallons, according to a meter which appears never to have measured more than seven and a half gallons to the cubic foot registered by it. And, at the end of that period, a flat rate of \$700 per year was agreed upon, although, according to the minimum rate, by meter measurement, with a meter which allowed only the minimum quantity of water per registered cubic foot to pass through, the charge should have been \$1,314. Another consumer, who during the ten months beginning February 1st, and ending November 30th, 1898, used an average of 2868 gallons per month, was charged, during four months, 40 cents, and during the other six months 35 cents per 1000 gallons, according to a meter which appears never to have allowed less than ten gallons to the cubic foot, registered by it, to pass through, and from that up to 28 gallons to the cubic foot. Again, one proprietor of a livery stable is charged a uniform rate of 20 cents per 1000 gallons, whilst another, doing about the same business, and not far distant, is never charged less than 25 cents per 1000 gallons, and from that to 45 cents per 1000 gallons; and still another, doing a somewhat smaller business, though taking his water by meter measurement, is charged 35 cents and 40 cents per 1000 gallons, and, all this, although the maximum charge for water so taken, even according to the defend-

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ant's publish tariff, is 35 cents per 1000 gallons, to consumers using from 100 to 500 gallons per day. The evidence is equally conclusive to the effect that the flat rates, charged to the smaller consumers, have been advanced and maintained, by the company, in excess of those exacted by the city during the last year of its administration.

OPINION.

The foregoing statement includes most of the facts, disclosed by the record, that we find necessary for the decision of the case. Others, which may be pertinent, will be incorporated in this opinion. Many facts have been pretermitted, because, if not wholly immaterial, they are, at least, unnecessary, to the particular issues upon which the case is to be decided. We have stated, in detail, the circumstances under which the defendant company came into existence, and the result of its establishment, regarded as an investment, in order that its exact relation to the state of Louisiana and to the city and people of New Orleans may appear fairly upon the record, inasmuch as the State, the city, the legislative committees which reported the resolution, under the authority of which this suit was brought, and the public officer by whom the suit was brought, have been made the subjects of criticism, in one of the printed arguments presented on behalf of the defendant, which appears to us to be wholly undeserved.

It will be seen from the statement, as thus made, that upon the organization of the defendant company, the city of New Orleans held \$1,169,500, out of a total of \$1,671,000 of its stock, actually issued, being also a majority of all the stock called for by its charter, but consented, nevertheless, that the control of the corporation should be vested in the minority stockholders, representing, at that time, but \$501,600 of the stock; and that, not only was the entire water works plant, which the city had acquired from the Commercial Bank, together with the extensions and improvements which had been made during the city's administration, turned over to the corporation so controlled, but that there were included grants of power, from the State, which gave to that plant its principal value, viz: the power to operate it in a corporate capacity; to expropriate private, and to appropriate and use, public property as the business of the company might require; the monopoly with respect to the water to be supplied to the City, and people, of New Orleans, for fifty years; and other powers and privileges, which need not be particularized. So that, the holders of the

bonds, which had been given in payment for the bare plant, after the franchises necessary to its operation had expired by limitation, were enabled, with the same bonds, and without additional cost, to re-acquire all the property sold by them, somewhat enlarged and extended, together with privileges worth far more than the property itself. The bonds in question, and the stock for which they were exchanged, were, at that time, worth thirty-three cents on the dollar. When, therefore, at the end of the first year, the company declared a dividend of 2 per cent. it represented 6 per cent. upon the money actually invested; and the dividends of five per cent. which have been declared of late years, have represented fifteen per cent upon that original investment, and have been paid with such regularity that the stock has commanded a premium, exceeding one-fourth of its par value. The owner of the stock, acquired according to the terms of, what is called a "hard bargain," driven by a sovereign state, descending to the level of "a common trader," has therefore gained, up to the present time, nearly three times the amount of his investment, by reason of its appreciation in value, and, almost, if not quite, as much more, in the meanwhile, in the way of dividends, declared from year to year.

There are, no doubt, many of the present stockholders, perhaps a majority of them, who have acquired their holdings by purchases in the market, who have paid the ruling price for their stock, and who have realized but a fair profit upon the money invested; and our remarks in this connection, are intended for no other purpose than to show that the company was not driven by the State into making a bargain, and that the bargain as originally entered into was not a hard one, as is charged.

In 1882, the city of New Orleans sued for taxes, from the payment of which, under Section 4 of the Act of 1877, the defendant was declared to be exempt; and the defendant, by way of reconvention, prayed judgment for the value of the water furnished to the city, which the same section declared should be furnished free of charge. It was decided by this court that the exemption from taxation was unconstitutional, but that the city should pay for its water, up to an amount equal to the taxes recovered, leaving upon the defendant, however, the obligation to furnish the water required, exceeding that amount in value, free of charge. *City of New Orleans vs. Water Works Company*, 36 Ann. 432.

Thereafter, the General Assembly passed an act (No. 56 of 1884)

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requiring the city to pay for all the water obtained by it in any year for which it might claim and recover taxes from the company. And a contract, made pursuant to that legislation, having been sustained by judgment of this court (*Conery et als. vs. Waterworks Co. et als.*, 41 Ann. 913), the city has since then, up to 1898, paid a total of over \$900,000 for its water supply, as against less than \$300,000 received for taxes. It was, moreover, held that the act of 1884 was not passed for the benefit of the defendant, but was an act intended to regulate the conduct of the city of New Orleans in certain respects, and that, when the city, agreeably to the terms thereof, agreed to pay for water, to which it was, under the previous decision of this court, entitled, free of charge, there was no such acceptance of benefit or waiver of obligation, on the part of the defendant, as to bring it within the provisions of the constitution, and thereby deprive it of its monopoly, or any other franchise, which it could not, under such circumstances, have continued to enjoy.

We now procede to inquire whether the powers and privileges conferred on the defendant, and from which it has derived such advantage, have been exercised in conformity to the conditions of the grant. It is part of the statement of facts, which precedes this opinion, that the water which the defendant furnishes and which it claims the right to furnish, at its option, whilst susceptible of clarification and purification, is neither clear nor pure. That fact has not only been recognized by the defendant and its officers, and by public officials and analytical chemists, but by the state of Louisiana in the very legislation under which the water is now supplied, to the exclusion of any better and purer water, to some 300,000 of her citizens. The act of 1877, within which, as amended by the act of 1878, the defendant lives and moves, as we have seen, is entitled "An act to enable the city of New Orleans to promote the public health, and to afford greater security against fire, by the establishment of a corporation to be called 'The New Orleans 'Water Works Company;' to authorize the said company to issue 'bonds, for the purpose of extending and improving the said works, 'and to furnish the inhabitants of New Orleans an adequate supply of 'pure and wholesome water,' etc.

This language plainly indicates that the attention of the law-makers was attracted to the question of the quality of the water to be furnished, and that the act to be passed would deal with that subject. It was no secret to them that the city of New Orleans had, for thirty-

five years, and more, been supplied with the water of the Mississippi river, as taken therefrom, and, if the proposed legislation contemplated only a continuation of the same supply the descriptive terms used were not only unnecessary, but inapplicable. But that such was not the purpose, is evident from the fact that the act confers upon the company the authority to obtain water elsewhere than from the Mississippi river, whereas its predecessor, the Commercial Bank, was restricted to that stream. Moreover, Section 5, confers upon the corporation the power "to construct, dig, or cause to be opened, any canals or ditches, whatever, for the purpose of conducting the water of the *rivers* from any place or places it may deem fit, and to raise and construct such dykes, mounds, reservoirs as may be required for securing and carrying a full supply of pure water to said city and its inhabitants," etc. And Section 9, provides that: "The Board of Directors shall have power * * * to borrow money for the purpose of improving and enlarging its works and increasing the supply of pure water; and to accomplish this, the said Board are hereby authorized to issue the bonds of the company," etc.

This use of the word "rivers," and of the adjective "pure"; the fact that the purpose expressed by the words, "improving and enlarging the works, and increasing the supply of pure water," is immediately afterwards referred to as "this purpose," rather than "these purposes," taken in connection with the title of the act, leave no doubt that the lawmakers contemplated that the corporation which they were creating should, at some time or another, either purify the Mississippi river water, if, it elected to obtain its supply from that stream, or else should bring water, which required no purification, from some other stream. The proposition that, whilst recognizing the fact that Mississippi river water, in its normal state, is not pure, they should nevertheless have undertaken to restrict a community, consisting of some hundreds of thousands of persons, to its use, as their main supply, for a period of fifty years, and should have undertaken to make a law prohibiting such community from obtaining a supply elsewhere during that period, seems inconceivable, and the argument that, notwithstanding that "pure water" is mentioned in both the title and the context of defendant's legislative charter, it is intended that it should be optional with the defendant, during the long period covered by that charter, to furnish either pure or impure water, as its interest may suggest, loses much of its force, when we consider, that if the word "pure" had been

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entirely omitted, the right of the defendant to furnish water of that description would have been unquestionable. But, let us suppose that the contention on behalf of the defendant, on this point, is well founded, and that it was the deliberate purpose of the law-makers of the last generation to restrict the people of New Orleans, for fifty years (before the expiration of which period the population may increase to half a million), to the use of unpurified water, as their main supply, at the option of a private business corporation; let us suppose that, so long as the corporation fulfills its obligations under the contract, which is said to result from this law, the community affected is without remedy, and must deny itself all water, except that furnished by said corporation, at least, it must be conceded that no such result follows if the corporation disregards alike the obligations and the prohibitions of the contract from which, alone, it *could* follow.

It is not claimed that the defendant company was granted the monopoly in question, with its other privileges in derogation of common right entirely without conditions. And, if the law-makers intended that it should enjoy that monopoly and those other privileges they also intended that it should observe the conditions upon which they were granted. But, one of the conditions was, that the company should charge no more for the water furnished by it than was paid to the city upon March 31, 1877. The charter of the company, under which its monopoly and all other franchises are enjoyed, contains a plain, positive prohibition to that effect. And yet the evidence in this record shows that the company, from 1883 up to the present time, has grossly, deliberately and persistently, violated that prohibition, by the establishment and enforcement of a tariff of charges for water greatly in excess of that thus authorized; and not only so, but, whilst enforcing its excessive, unauthorized, and illegal charges, has unjustly discriminated between citizens and other corporations with respect to their supply of an element and a commodity, equally necessary to human existence and to human affairs. This violation of the law and of its charter obligations is not one the effect of which is confined to the company, as a business entity, or to the investment of its stockholders. It inures to their pecuniary advantage; but, in its operation, it oppresses, and has oppressed, and will continue, if allowed to continue at all, in perhaps even greater degree, to oppress an absolutely dependent public. In view of these facts, the law demands that the privileges and corporate life thus abused should be withdrawn. And it

requires no other law, and no other construction of law, than such as is found in, and authorized by, the Civil Code of this state, to reach such a conclusion.

C. C. Arts. 14, 18, 447; Atchafalaya Board vs. Dawson, 13 La. 497; State vs. New Orleans Gas Light & Banking Co. 2 R. 529. But the same law prevails in other jurisdictions, and the conclusion stated is sustained as well by the authorities furnished on behalf of the defendant as by those furnished on behalf of the plaintiff.

"A private corporation, created by the legislature, may lose its franchises by a misuser, or a non-user, of them; and they may be resumed by the government, under a judicial judgment, upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Territt vs. Taylor, 9 Cranch 51.

Morawetz on Private Corporations, 1st Ed., Par. 640.

"It has accordingly been held, in various cases, that, if a corporation has assumed the performance of duties for the benefit of the public, generally, it cannot neglect the performance of those duties without incurring a forfeiture of its franchises."

"If a duty is prescribed by the charter of a corporation in express terms it seems that the company will hold its franchises upon the condition that the duty shall be performed; and, hence, an omission to perform will constitute a sufficient ground for declaring a forfeiture of the company's franchises."

"Any act of a corporation which is forbidden by its charter, or by a general rule of law, and, strictly, every act which the charter does not expressly or impliedly authorize the corporation to perform, is unlawful; and if the doing of such act is an injury to the public, it may be sufficient ground for declaring a forfeiture of the corporate franchises." Morawetz, Par's. 643-5.

In New York it has been held to be sufficient ground to justify the forfeiture of the charter of an insurance company that such company had undertaken to carry on banking operations in violation of a general law prohibiting unauthorized banking. People vs. Utica Ins. Co., 15 Johns. 358.

In Pennsylvania it has been held that where a bank was prohibited by its charter from making loans at a greater rate of discount than one-half of one per centum, for thirty days, and from dealing in promissory notes, and it was shown that this provision had been wilfully and

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repeatedly violated, there was sufficient cause for declaring the charter forfeited. The Court, through the Chief Justice, said:

"It may be affirmed, as a general principle, that where there has been a misuser or a non-user, in regard to matters which are of the essence of the contract between the corporation and the State, and the acts or omissions complained of have been wilful and repeated, they constitute a just ground for forfeiture." *Com. vs. Commercial Bank*, 28 Pa. St. 389.

In *State vs. Commercial Bank of Manchester*, 33 Miss. 497, the court, referring to a restriction in the charter of the bank with respect to the charging of interest, said: "The same law which gave her existence imposed the restriction and prescribed to her certain rules of action, which must be regarded as so many conditions annexed to the grant, and as tantamount to saying to the bank 'you are now endowed with certain rights and privileges which you can exercise and enjoy during the period specified in the charter, upon condition that you act according to the rules therein prescribed.' The rule prescribed as applicable to the case before us, is, that the bank shall not take exceeding seven per cent. per annum discount on notes having less than twelve months to run to maturity. This rule is the law which must govern the case before us, and the replication alleging, a course of business, persevered in for at least six months, in palpable violation of this rule, presents, in our opinion, a good cause for forfeiture."

It is said, however, on behalf of the defendant, that according to the terms of the charter, the only remedy in the case presented is to be found in that provision which authorizes the city of New Orleans to proceed by mandamus to enforce a reduction of charges. We do not so construe the law. Section 15 of the Act of 1877 reads: "That the Water Works Company shall have the right to fix the rates for water; provided, that the net profits of the company shall not exceed ten per cent. per annum, and shall publish annual statements of its business and condition; and that the City Council shall have the power to appoint a committee, of not less than five, who shall have access to the books of said company, and make such extracts from the same as they may deem necessary; and, in case the profit shall exceed ten per cent, the City Council shall have the right to require said company to reduce the price of water in such manner and in such proportion that the profits shall never exceed the above named rates; and provided further.

that the rates charged shall never exceed those now paid by" (to) "the city, and in case said company shall refuse compliance, the demand of said city may be enforced by mandamus." This section of the law is somewhat inartificially drawn, but we are of opinion that a reasonable construction requires that the "demand," which the city is authorized to enforce, by mandamus, should be held to relate back to the demand which the city had been previously authorized to *make*, to-wit, the demand for a general reduction in the price of water whenever the profits of the company exceed ten per centum per annum. It would be inadmissible to suppose that the individual consumer, who might be the victim of extortion practiced by the company, was to be left without remedy, and absurd to suppose that his remedy was to consist of the mandamus proceeding which the City of New Orleans was authorized, but not compelled to bring under the conditions stated in the act. Nor does the fact that such consumers might resist overcharge against them, and have actually and successfully done so, affect the rights and obligations of the state in the premises.

It is also said, that, whilst the petition alleges that the defendant has been guilty of charging more than was charged by the city during the period immediately preceding the transfer of the works, it is further alleged that the tariff then enforced by the city was that embodied in the ordinance adopted in 1870, and that, as said ordinance was never promulgated, it follows that the action must fall, on this ground. We do not concur in this reasoning. The first, and material, proposition of the State is, that the charges enforced by the defendant have exceeded those which were enforced by the city, and this proposition has been established by conclusive evidence. Beyond that, it is perfectly immaterial whether the charges enforced by the city correspond to those embodied in the unpromulgated ordinance or not.

The defendant was afforded the amplest opportunity, on the trial of this case, and it has had ample opportunity heretofore, in the *Levy* and *Ernst* cases, and in several other cases, to show that the tariff enforced by the city at the date of the transfer of the works, and in March, 1877, was other than as testified to by their ex-president; and if it was unable to make such proof whilst it had the books of the city in its possession, there is no reason to suppose that it can do so now, since those books have disappeared. Holding these views, we find it unnecessary to consider the other questions presented.

For these reasons, it is ordered, adjudged and decreed that the judg-

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nient appealed from be annulled, avoided and reversed, and it is now ordered, adjudged and decreed that there be judgment in favor of the plaintiff, the State of Louisiana, and against the defendant, the New Orleans Water Works Company, decreeing the forfeiture of the charter and of all the franchises heretofore conferred upon said defendant corporation. It is further ordered that said defendant pay the costs of these proceedings.

BREAUX, J., concurs in the decree. PROVOSTY, J., takes no part, the case having been argued and submitted prior to his appointment on this bench.

ON APPLICATION FOR REHEARING.

MONROE, J.—The first proposition contained in the brief filed in support of the application for rehearing is, that, "The Court erred in the statement" that the most important books, showing the charges and collections made by the city, have been lost, the defendant, to whom they were delivered with the works, and who had possession "of them for several years thereafter, being now unable to account for them." The books thus referred to are those showing the rates charged by the city, for water furnished by measurement, as contra-distinguished from those showing the "flat" rates charged, to small consumers. It is not denied that they were delivered to the defendant, with the works, nor is it denied that they were in the possession of the defendant for several years thereafter, nor, yet, is it denied that they were called for by the plaintiff for the purposes of the trial of this case in the district court and that the defendant was unable to produce them. It is said, however, that the court has erred in attributing undue importance to the particular books mentioned, and in intimating, in the statement quoted, and throughout the opinion, that the defendant appears "in the very equivocal position of a spoliator of evidence."

We avail ourselves of the opportunity to say that it was not the purpose of the opinion handed down, nor is it the present purpose, to charge the defendant, either directly or by implication, with deliberately spoiling or suppressing evidence of any kind. We think, and we shall endeavor to show, more clearly than we have done, that the books in question bear such an important relation to this case, as to furnish, now, almost the sole measure of the obligations of the defendant and

of the right of the public and of the State in the matter of the charges for water supplied by measurement, and hence, that it was the duty of the defendant to have preserved them in safety and in such a manner as that the State and the public, as parties in interest, could at all times have obtained access to them; but, that the defendant has failed to discharge that duty, and that the loss of the books is attributable to its gross negligence, the beginnings of which appear to have been co-incident, in point of time, with its determination that it would no longer be governed, in the matter of its charges, by the rates which had been paid to the city, and which were recorded in those books; and, for these reasons, that the defendant is not in a position to complain of any reasonable indulgence extended to the plaintiff in its effort to establish the contents of the books by secondary evidence.

It was stated by one of the counsel for the defendant, in oral argument before this Court, that, by referring to the briefs in the cases of Ernst & Co., and Stewart & Rickert vs. N. O. Water Works Co., it would be found that the missing books had been brought up with the appeals in those cases, and had been filed, in the originals, in this court, fifteen years ago; and it was also stated that an unavailing search had been made for them in the clerk's office; and these statements are reiterated in the brief which we are now considering. It does not appear that any such return was made to the *subpoena duces tecum* issued for the purposes of the trial in the district court, or that the search referred to was instituted at that time; and, as the "case" of Ernst & Co., with which that of Stewart & Rickert was argued in this court, was admitted in evidence on that trial, over the objection of the counsel for the defendant, who still insist upon their objection, and further insist that nothing was offered or admitted save the "record," we should hardly have expected that they would rely, as they are now doing, upon the briefs in that case, as showing that the defendant was able to account for the books which it was unable to produce when called upon, and this more particularly as it was stipulated that the transcript, in the case of Ernst & Co., on file in this court, should be used for the purpose of the appeal, and it does not appear that the briefs attached thereto were ever called to the attention of the district judge. We have, nevertheless, in response to the invitation of the counsel, examined the briefs in the cases mentioned, as also the transcripts, and, having extended our inquiry to the cases of Levy; Allen & Syme, Louis Ruch; and Warner & Hoelzel, against the defendant, which "cases" or

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"records" were also offered in evidence on behalf of the plaintiff, we find the following state of facts, to-wit:

In the month of October, of the year 1883, that being the second, business, year, dating from April, 1882, of the administration of the waterworks under the defendant's new president, and of the operation of what that officer reported as "*a proper and reasonable advance in the great majority of the assessments,*" the plaintiffs above named instituted suits in which they alleged and complained, that they were engaged in rice milling in New Orleans, and required steam power; that their only means of obtaining water for that purpose was through the works controlled and operated by the defendant, since the defendant was claiming and exercising the exclusive privilege of furnishing the water supply to the inhabitants of New Orleans; that, by law, and by the terms of its charter, the defendant was bound to furnish the water required by them at the rates paid to the city upon March 31st, 1877, but, that defendant refused to receive payment at those rates, refused to furnish water unless much higher rates were paid, and had threatened to harass the plaintiff unless its demands were complied with; and, that the plaintiffs feared that it would cut off their water supply entirely unless restrained from so doing, and they prayed for injunctions and for judgments decreeing that they were entitled to water at the rates paid to the city upon March 31st, 1877.

The Levy case was tried and there was judgment for the plaintiff from which the defendant appealed, and lodged its appeal in this court in October, 1885. The other plaintiffs were represented by the same counsel, and, beyond the issuance of the injunctions prayed for by them, further proceedings in their cases appear to have been, in the meanwhile, suspended.

Upon the trial of the Levy case, the rates charged by the city, as shown by the books in question, and as charged by the defendant during the four years immediately following its acquisition of the works, were established by the testimony of the gentleman, who, during that time, had been the defendant's president. We make the following excerpt from that testimony: "Did you ascertain in any way the rates that had been charged by the city immediately previous to your taking charge? A. I was guided by that. Q. How do you mean? A. The assessment of the previous years. (Objection). Q. Were you informed as to what the assessments of previous years had been? A. I found them in the books. Q. Were the books containing those

assessments in the possession of the Water Works Company at the time you took charge? A. Yes, sir. Q. You say you were guided by them in making your assessments for the first year? A. Yes, sir. Q. Do you mean by that that you took those assessments? A. I do, Q. And proceeded to collect on that basis? A. I did, that, is, as much as possible. Q. How long was that course continued? A. Until the time I left there. (Cross-Ex.) Q. Did you leave those books with the waterworks company at the time you left? A. Yes, sir."

The transcript of appeal in the case in which this testimony was taken, and which by agreement of counsel we were to have used (subject to the objections urged) for the purposes of the instant case, cannot be found, and when the original opinion was prepared, not having taken into consideration the sources of information to which we are now referred, we were unable to say whether the books, themselves, had been offered. In the brief filed on behalf of the defendant in the cases of Ernst & Co. and Stewart & Rickert, however, we find the following statement, to-wit: "At this time," (i. e. when the Levy case was tried) "the books in which the water rates of the city were recorded were missing and could not be found. Since then they have been found and are in evidence in this case, being brought up in the originals, by stipulation." The cases of Ernst & Co. and Stewart & Rickert were tried in 1886, after the judgment in the Levy case had been affirmed on appeal, and there were judgments for plaintiffs, as in the Levy case, which were also affirmed on appeal. So that, in the Levy case, the books in question being missing, the plaintiff obtained judgment upon establishing, by means of the testimony of the defendant's former president, "the water rates of the city" recorded therein, and otherwise proving that the amount demanded of him exceeded those rates. And, thereafter, the books being produced and offered on behalf of the defendant, Ernst & Co. and Stewart & Rickert obtained like judgments, before another judge of the district court, and in this Court, upon establishing the same facts, *by means of the books*, as well as of the relevant testimony which had been given in the Levy case, and which was admitted by consent of the counsel on both sides; following which, as we understand the evidence, like judgments were rendered by the district court in the cases of Allen & Syme, Louis Ruch, and Warner & Hoelzel; and, from these last mentioned judgments no appeals were taken. The transcripts in the cases of Ernst & Co. and Stewart &

Rickert were lodged in the office of the clerk of this Court in March, 1887, and the judgments appealed from were affirmed in May of the same year. The books in question, brought up in the originals, and not incorporated in the transcripts, were, in all probability, not filed at all. If they were filed the records of this court fail to show it.

In any event, after the litigation, for the purposes of which they were deposited in the clerk's office, had terminated, the defendant, as the owner and depositor, was at liberty to have withdrawn them, and, as no one else had that right, it is not unreasonable to suppose, in the absence of evidence to the contrary, that the books were withdrawn by it, rather than that they should have disappeared by reason of any failure on the part of the clerk properly to discharge his duty as custodian. If they were so withdrawn, and have since been lost by the defendant, as they appear to have been lost during the trial of the Levy case, it is not surprising that the search recently made by counsel no doubt in the utmost good faith, in the clerk's office, was barren of results. If the defendant did not withdraw the books, after the cases of Ernst & Co. and Stewart & Rickert were decided, it seems to us that some explanation should be offered for its failure to do so, for this court had, then, three times, decided that the rates paid to the city, *as recorded in those books*, were the rates by which the defendant was bound to regulate its charges during the many years of its prospective existence, and the information afforded by the books was, therefore, of vital concern in the matter of the discharge by the defendant of its obligations under its contract and of the protection of the rights of the state and of the city of New Orleans and its inhabitants, as parties to, and beneficiaries of, that contract, since, as the years pass, it can well be understood that it becomes not only difficult but impossible to obtain that information from any other source. Whether, therefore, the defendant withdrew the books, and lost them, or whether they have been lost by reason of its failure to withdraw them, the indisputable fact is, that, having the exclusive control of records affording information by means of which it was bound to regulate its charges for water sold by measurement, it has so exercised that control as to dispossess itself of those records and to cut off the parties against whom such charges are to be made from access to that information, and, having done so, it now assumes the right to enforce a tariff of charges established by itself.

It is said that the court erred "in using as evidence in this cause

the records in the cases of Isaac Levy and of others as against this defendant for the reason that the using of the records in said cases was objected to as being *res inter alios acta* and inadmissible in evidence, and admitted over objection, and to which admission exceptions were noted and reserved; and that the evidence adduced in said causes was neither offered, nor admitted, in evidence on the trial of this case."

The consideration, moving to the State, in the contract, the violation and non-fulfillment of which is the cause of action set forth in the petition of the State, was the defendant's obligation, among others, to furnish the inhabitants of New Orleans with water, at a certain price. The State alleges that the defendant has violated that contract, and the law, by exacting a price for the water furnished by it in excess of that so agreed upon and authorized. It can hardly be denied that the individuals, for whose benefit, and with respect to whose water supply, the State entered into the contract with the defendant, and granted to it the monopoly which it enjoys, are competent witnesses in this case to show that they have been overcharged and that they have complained of the overcharges, and it is admitted, in the argument, now presented on behalf of the defendant, that such individuals had, and have the right to go into court, contradictorily with the defendant, and without making the State a party, for the enforcement of that contract with respect to such overcharges. And, yet, we are told that the fact that those individual beneficiaries have obtained relief by means of judgments, against the defendant, decreeing such violations of the contract sued on to have been committed is irrelevant to the present issue. We do not find it necessary to discuss this proposition.

It is further contended that the offers made by the plaintiffs were of the "records" in the cases mentioned and that such offers did not include the evidence, and hence, that such evidence should not be considered for the purposes of the case now under consideration. It is only necessary to say, in answer to this, that we have not considered the evidence referred to except that of the ex-president of the defendant company, which, it is admitted, was specially offered.

It is said that "the court erred in admitting, or using, the alleged testimony of Edward Toby, alleged to have been given in the case of Isaac Levy vs. New Orleans Water Works Company, which alleged testimony was admitted over defendant's objection and a bill of exceptions reserved to the admission of the same, and this court also erred as to the weight and effect to be given to said testimony, if admitted."

In support of this criticism, it is contended that the typewritten document, purporting to contain testimony given by Mr. Toby (who is defendant's ex-president), in the Levy case, and offered as such, was not sufficiently identified, and this finds some support in the fact. But the Levy "case" and the "cases" of Ernst & Co. and of Stewart & Rickert were also offered, with the stipulation that the transcripts, in this court, should be used; and, whilst the transcript in the Levy case is missing, we find, in the transcripts in the other two cases, the testimony of Mr. Toby, given in the Levy case, offered and admitted, by agreement; and, in the brief filed by the defendant's counsel, in the two last mentioned cases, to which brief we have been especially referred for the purposes of the present application, that testimony is reproduced and made the subject of criticism. It can hardly be said, therefore, to lack identification. But, it is said, the testimony was not admissible, *per se*, and the typewritten instrument would have been admissible "only as a memorandum, made by a third person, and recognized by the witness as constituting a correct repository of facts, which he, many years ago, knew to be true, and which facts were perpetuated in the document in question," therefore, as Mr. Toby was unable either to recognize the instrument or to remember the facts which it purported to perpetuate, the testimony should not have been admitted. Sir J. Stephens, in his "Digest of the Law of Evidence," states the common law rule applicable to the question to be, that "Evidence given by a witness in a previous action is relevant for the purpose of proving the matters in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is dead, or insane, or so ill that he will probably never be able to travel, or is kept out of the way by the adverse party, or, in civil, but not, it seems, in criminal, cases, is out of the jurisdiction of the court, or, perhaps, in civil, but not in criminal, cases, when he cannot be found; *provided* in all cases: (1) That the party against whom the evidence is to be given had the right and opportunity to cross-examine the declarant, when he was examined as a witness: (2) That the questions in issue were, substantially, the same in the first as in the second proceeding: (3) That the proceedings, if civil, were between the same parties, or their representatives in interest. (4) That, in criminal cases, the same person is accused upon the same facts." Stephens Dig. Art. 32.

There is no doubt that the defendant in the instant case had the right, and the opportunity, to cross-examine the declarant when he was

examined as a witness, and that it availed itself thereof. The questions at issue in the Levy case were, whether the defendant was charging more for water furnished in quantities than had been paid to the city, and whether, in so doing, it was violating the law of its existence and of the state; and it was upon those identical issues that this case has been decided. It is conceded in the present argument that Levy and the other rice millers had the right to bring their suits on the identical contract, made, in their behalf, by the State, upon which the State, itself, brings the present suit. It is said, however, that the witness was neither dead, nor insane, nor sick, nor inaccessible, but, when put on the stand, was unable to identify the document purporting to contain his former testimony, which had not been written by him, or to remember the facts therein stated. Mr. Chase, in his edition of Stephens' Digest, says: "There are three cases of refreshing memory: (1) When the witness, by referring to the writing, is enabled to recollect the facts, and can testify, in reality, from memory: (2) When the witness, after referring to the writing, does not recollect the facts and yet remembers that he made or saw the writing when the facts were fresh in his mind and that it then stated the facts correctly: (3) When the witness, after referring to the writing, neither recollects the facts, nor remembers having seen it before, and yet, from seeing his handwriting therein (as in signature, contents, or both), is enabled to testify to its genuineness and correctness.

Chase's Stephens' Dig. Arts. 136, 341-2, *notes*.

But the reason upon which they are founded is somewhat broader than the rules as thus stated by the text writers, and the courts have not hesitated to appeal to the former when the latter have been found too narrow for the case to be decided. Thus, what matters it whether the witness, who is unable to remember the facts testified to on the former trial, identifies the instrument in which his testimony is preserved, or whether the genuineness of such instrument is established by the admission of the person against whom it is offered, or in some other satisfactory way, so long as the witness is able to say that the testimony as given was true? Mr. Toby could not have been expected to identify a typewritten instrument which he had never before seen, but he could testify, and he did testify in substance, that, if the testimony contained in the instrument exhibited to him was that given by him in the Levy case, it was true and he stood by it, though, by reason of the lapse of time (fifteen years) and his age, he was no longer able

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to remember the facts testified to. And that it was the testimony so given by him in the Levy case is abundantly shown by the admissions and evidence to which we have already referred.

"Where a witness has given his deposition, and, afterwards, upon being called to the stand to testify, his memory of the transaction fails, his deposition may be read in evidence by the party calling him." Jack vs. Woods, 29, Pa. St. 325.

*sub. This
quotation is
absolutely
inaccurate.*

In Lawson vs. Jones 61 How. Pr. 424, the question was, whether a party who had been examined on the first trial and was rendered incompetent by the death of his adversary before the second trial could have his testimony, given on the former trial, read at any subsequent trial, and Judge Daly (of the Court of Common Pleas of N. Y., the entire bench concurring) held, that "There is no substantial reason why the testimony in such trial should not be read. The party was on the stand, and could have been cross-examined, and the same opportunity for scrutiny and for contradiction existed as if the jury had agreed upon a verdict. The objection, taken upon appeal, that the testimony cannot be read by the stenographer, who took it down on the former trial, from his notes, but must be produced in the form of depositions, reduced to writing and subscribed by the party, is not good. Such a rule would exclude all testimony taken in the manner authorized by law, and render the Code inoperative." Rice on Ev. Vol. 1, pp. 395-6.

We might say the same thing in this case, since the testimony of witnesses in civil cases is taken in most, if not in all, of the district courts of this state by stenographers, and is not signed by the witnesses. And this practice is recognized in other jurisdictions, where the rule referred to by Judge Daly, predicated upon the practice which had obtained before courts and litigants had begun to avail themselves of the services of stenographers has been disregarded. Thus, Mr. Bradner says: "A transcript made by an official stenographer and duly certified by him to be a *verbatim* transcript of his notes of the evidence given upon a former trial is admissible." (Citing, Bridgman vs. Carey, 62 Vt. 1; Com. vs. McCarthy, 152 Mass. 577; Com. vs. Doughty, 139 Pa. St. 383; Stege vs. State 127 Ind. 15; State vs. Byers 16 Mont. 565).

Bradner on Ev. 477, (and notes).

It is further suggested that the court erred in the matter of the weight and effect to which the testimony of Mr. Toby is entitled, and we

are invited to consult the brief filed by the defendant's counsel in the "Edwards' record as showing the contents of the missing books, excerpted in rebuttal of that testimony. This is probably a typographical error, and we assume that the counsel is referring us to the brief in the case of "Ernst & Co.," in which we find excerpts such as those indicated. But this court had before it at that time not only the excerpts made by the defendant's counsel, and other excerpts made by the counsel for the plaintiff, but it had the books themselves, as also the testimony of Mr. Toby, and it, nevertheless, reached the same conclusion as had been reached in the Levy case, the judgment in which was predicated upon the testimony of Mr. Toby, without books or excerpts. We find nothing in the case as now presented, therefore, to justify us in holding that we, or our predecessors, have committed the error suggested.

It is said that "the court erred in multiplying by ten (through a clerical error) the average amounts realized by the defendant from the sale of water by it pumped from the Mississippi river and distributed through its mains to the people of the city of New Orleans, which clerical error is vitally important, because, apparently, showing a revenue derived by defendant from it's sales of water ten times greater, in the average per gallon, than justified by the evidence, even as construed by the court." This error is admitted, but it does not affect the conclusion reached. The purpose was to show that, from a certain date, the defendant received more money for less, or for an equal quantity of, water, than had been received, by the city, and that the average amount received per gallon, was larger. In order to establish the latter proposition, the total amounts received by the city and by the defendant were divided by the number of gallons pumped by them, respectively, and the quotients were stated in tens when they should have been stated in units. As the same error was committed on both sides the only cause of complaint lies in the fact that it was made to appear that the average amount, per gallon, received by both the city and the defendant, was larger than it really was. Beyond this, we agree with the learned counsel that the proposition as demonstrated, to-wit: that the defendant received more money for less water and a larger average price, per gallon, than the city, would be insufficient, in itself, to support the judgment rendered. The fact proved was, however, merely one of a number, leading to the same conclusion, and used in a process of inductive reasoning to establish that conclusion. It might have

been omitted and the result would have been the same.

It is said that the court erred "in finding that the rates charged by the defendant are, or were, at any time, greater than any city tariff, or alleged city tariff, either the so-called "Hatch" tariff, or the alleged tariff of 1870, and that there is no evidence in the record showing or tending to support such finding." No attempt was made to show that the rates enforced by the defendant exceeded those established by either of the tariffs mentioned. On the contrary, it was distinctly held that the "Hatch" tariff had been abandoned; that the tariff of 1870 had never become operative; and that the only question to be determined was whether the defendant's charges have been in excess of those *actually made by the city, in March, 1877, as shown by the books of the city.* The defendant's president, elected in 1882, referring, in his annual reports from time to time, to the "dissatisfaction" and "little natural remonstrance" which resulted from his advancing the price of water, was at some pains to say that the advances were within the company's "*authorized tariff.*"

The learned counsel, in a brief heretofore filed in this case, said: "Whilst we contend that the 'Hatch,' or 'Bragg,' tariff was, unquestionably, the one in force in 1877, still, we cannot see that, 'in so far as this particular case is concerned, it will make much difference whether the one or the other' (the Hatch tariff or that of 1870) "be adopted, because there is scarcely a bill, of the five hundred, or more, offered in evidence by the plaintiff, which is as high even as the rates allowed by the alleged tariff of 1870." The gentleman who, as president of the company, administered its affairs during the four years, from 1878 to 1882, immediately succeeding its acquisition of the works, gave the following testimony in the Levy case, whilst under cross-examination, in 1885, by one of the present counsel for the defendant, to-wit:

"Q. Do you know anything about any Bragg tariff? A. There was a tariff, I think it was the 'Hatch.' General Bragg was in charge of it during the city administration. Q. What do you know about that? A. Well, that had been abandoned. Q. By whom? A. By the city. Q. How do you know? A. By the books, by their hydrant books. Q. Tell us in what instance they had abandoned it? A. Because they had reduced their charges, they had been greatly reduced and the city had been reducing it for several years. Q. What do you mean by the city? A. The City Administrator of Water

"Works. Q. When did they abandon it? A. The books show that. "They were the only evidence I had of it, for a year before I took "charge." It is also shown, as we think, that the rates charged by the city in 1877 were lower than those established by the unpromulgated tariff of 1870. In view of this testimony and of the express prohibition in the defendant's charter to the effect that it should charge no more for water than was *actually paid to the city in March, 1877*, it is difficult to understand how it can be contended that the "Hatch" tariff was in force at that date, or that the defendant could have had any other "authorized tariff" than such as was to be found, and as the defendant actually found during its first four years of existence recorded in the books of the city.

It is said that the court erred "in applying the vague term 'large consumers,' not only to Isaac Levy, and the other rice millers, similarly situated, who sued for a reduction of water rates, in 1884, or "thereabouts," (the suits were brought in October, 1883,) "but to "consumers using far less water than said Levy and others, and "in the "failure to find what was meant by 'large consumer,' and who "was "entitled to be considered as a 'large consumer.'" The whole course of the defendant, since 1882, and the arguments which it's counsel have addressed to this court in the instant case show that it has proceeded upon the theory that because there was no regularly adopted and published tariff in force at the date of it's acquisition of the works, the prohibition against it's charging more for water than was actually paid to the city at that time must be read out of it's charter and held to be of no effect; and, the books showing what was so paid having been lost, whilst under its control, the most strenuous effort has been made to exclude probably the only evidence which is now obtainable as to their contents. That evidence was introduced in the Levy case in the absence of the books; and, in the absence of the books, the district court and this court found that Levy, who was shown to have consumed 1,237,500 gallons of water during the milling season, of eight months, was overcharged, and that he was entitled to water at the price which he, and others similarly situated, had paid to the city, to-wit: at the rate of 15 cents per thousand gallons. Referring to the judgment appealed from, this court said: "The judgment is based on as reliable "data as can be obtained. It is more favorable to the company than "the computation warrants, but the plaintiff does not complain." *Levy vs. Water Works Co.*, 38 Ann., 28. The cases of *Ernst & Co.* and of *Stewart & Rickert* were afterwards tried, *with the books.* and, also, with

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the testimony, as to their contents, which had been given in the Levy case. What the books showed was, in view of the decision which had been rendered in the Levy case, the most important question to be decided, and it was elaborately argued. In one of the briefs to which we have been referred (that of the plaintiff's counsel) it was said: "Your Honors, by examining those books may see that, although charges over fifteen cents a thousand gallons were made for water where the annual consumption was less than a million gallons, yet there is no case where the consumption of water was over a million gallons where the charge was over fifteen cents per thousand gallons." In the brief filed on behalf of the defendant this statement was contested, and what purport to be extracts from the books were reproduced, and it was said, in regard to them: "The extracts cover a period of time when the city used meter measurements in estimating quantity. The average highest charge per thousand gallons during the period of meter measurements was 26½ cents. The average lowest 21 cents. The average amount paid for water 23½. The highest rate shown on the tables was 40 cents per 1000."

Turning to the extracts referred to we find that they begin with water furnished in 1868 and that some of them show the charges made in 1876 and 1877, and others do not. In any event, it is evident that the averages thus arrived at had nothing to do with the question before the court, which was, what was the amount charged upon March 31st, 1877? And it must have been so considered since the position of the plaintiffs was sustained and there were judgments in their favor. It was, therefore, judicially ascertained, contradictorily with the defendant in the cases mentioned, that a person who used 1,237,500 gallons of water, or more, in eight months, was entitled to such water at the rate of 15 cents per 1000 gallons, and, although it was not held that a person using less would not have been entitled to it at the same rate, it seems fair to suppose, from the arguments presented, that a person using less than 1,000,000 gallons a year would have been required to pay a higher rate. These last mentioned cases were decided, as we have already stated, in 1887. The evidence in the instant case shows that, in 1894, the Cosmopolitan Hotel used 4,838,695 gallons of water for which it paid the defendant at the rate of 30 cents per 1000. It is said that this was an exceptional case, but no reason is given why it should have been so, except that the proprietor of the hotel paid his bills without objecting. That, we apprehend, is what the uncomplaining

ing mass of the people have been doing. If, upon the other hand, we believed that the only fault of the defendant lay in exceptional overcharges we should be willing to attribute such overcharges to error or accident. But such is not the case. In 1898, the defendant, acting upon the theory that it was bound by no established rates, published a tariff of its own making, in which we find the following:

"For daily average of 100 to 500 gallons, per 1000 gallons, 35 cents.

"For daily average of 500 to 2000 gallons, per 1000 gallons, 30 cents.

"For daily average of 2000 to 4000 gallons, per 1000 gallons, 25 cents.

"For daily average of 4000 to 5000 gallons, per 1000 gallons, 20 cents.

"For daily average of 5000 to 10,000 gallons, per 1000 gallons, 15 cents."

"Consumption above 10,000 gallons, daily, special rates."

From this it will be seen that a person consuming a maximum of 5000 gallons a day or 1,825,000 gallons per year was required to pay at the rate of 20 cents per thousand, which was five cents in excess of the rate for which it had been held, more than ten years before, that Levy was liable, though there was no appreciable difference in the average daily consumption, and the gross amount consumed in the twelve months would be nearly 600,000 gallons more than was consumed by Levy, as the latter used the water during only eight months. So, according to the defendant's tariff, a person consuming a maximum of 4000 gallons a day, or 1,460,000 a year, would be charged at the rate of 25 cents per thousand. And yet, we think, within the meaning of the Levy case, and the other cases which have been decided against the defendant, and within any reasonable interpretation of the words, that a person who uses 1,460,000 gallons of water a year is a "large consumer." Beyond this, for the purposes of the present application, we have made a further and more critical examination of a number of the books showing the flat rates paid to the city, in the years 1876-7 and 1877-8, by small consumers, and we have satisfied ourselves that there was no error in the statement, contained in the opinion handed down that "the flat rates charged to the smaller consumers have been advanced and maintained by the company in excess of those exacted by the city during the last year of its administration."

The proposition that no decree of forfeiture should be rendered in this case, except upon a tender, by the State, to the defendant, of the

State vs. Weston.

bonds which were given by it's stockholders in exchange for their stock, appears to us to be untenable. The defendant was established, as private corporations are usually established, by, and for the benefit of, its promoters, who held the bonds of the city of New Orleans, and as a measure of relief which, no doubt, many other creditors of the city would have been glad, at that time, to have had extended to them. The only consideration received by the State for the valuable privileges granted by it was the advantage which it was supposed would inure to a community of her citizens from the faithful discharge by the corporation of the obligations assumed by it, and the corporate and other franchises were granted upon the condition, that, if those obligations were not faithfully discharged, the franchises would be withdrawn. This was, and is, the law of this state, which entered into, and became a condition of, the contract, and the decree of forfeiture is merely the enforcement of that condition. Rehearing refused.

No. 14,168.

STATE OF LOUISIANA VS. NATHANIEL WESTON.

SYLLABUS.

1. The time for urging objection to the charge of the judge to the jury is before the retirement of the jury. Such objections, if urged for the first time on motion for new trial, will not be considered by this court.
2. The grounds of such objections must be stated, so as to inform the trial judge of the nature of the objection and afford him an opportunity to rectify the matter complained of. The degree of particularity required in stating these grounds will depend upon whether the objection is based purely on law or partly on facts. To challenge the correctness of a legal proposition involved in a charge, it is sufficient to point out the particular part objected to and to say that it is not a legal charge; but to challenge the correctness of a charge because of its inapplicability to the facts, or because of its not stating the law with sufficient fullness, or in terms suitable to adapting it to the facts of the particular case, the respects in which the charge is deficient must be specified.

A PPEAL from the Twenty-Fourth Judicial District, Parish of West Feliciana—*Kilbourne, J.*

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107	881
107	45
109	1089
107	45
116	828

Walter Guion, Attorney-General, and *Robert C. Wickliffe*, District Attorney, (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Samuel McC. Lawrason, for Defendant, Appellant.

The opinion of the court was delivered by

PROVOSTY, J.—This case is before us on two bills of exception. The first to a part of the charge to the jury, and the second to the refusal of a new trial.

It is contended in behalf of the State that the objection embodied in the first bill cannot be considered by us because, so far as the bill shows, the grounds of it were not stated at the time that it was made. Such is the rule, the grounds or reasons of an objection must be stated; an objection cannot be efficiently made in general terms; the idea being that the trial judge should be fully informed of the nature of the objection, in order that he may be afforded an opportunity to correct his charge if erroneous; and this to avoid the setting aside of verdicts for matters which could and probably would be rectified if properly and timely called to the attention of the judge. *State vs. Callahan*, 9 Ann. 210; *State vs. Chopin*, 10 Ann. 458; *State vs. Beaird*, 34 Ann. 105; *State vs. Smith*, 35 Ann. 543; *State vs. Melton*, 37 Ann. 77; *The Francis Wright*, 105 U. S. 389.

The bill reads, as follows:

“Be it remembered that on the trial of the defendant, Nathaniel Weston, for manslaughter, in this cause, the evidence on the part of the State having been affirmative in character, and that on the part of the defence negative in character, the court charged the jury as part of the instructions given them for determining the guilt or innocence of the accused, the defendant herein, that affirmative evidence was rather to be believed than negative evidence when witnesses testifying to affirmative and negative facts are equally reliable, and were shown to have had equal opportunities for observation. To which part of the charge defendant by counsel objected as prejudicial to the defendant, and not a legal and proper charge to the jury, though the court had also charged in connection with said part of the charge objected to “—that the jury were the sole and exclusive judges of the evidence, and that it was the duty of the jury to weigh the testimony of all witnesses, and that it was in the province of the jury to accept or reject all or

any part of the testimony of any witness, and that it was for the jury to judge of the credibility of witnesses '.

That defendant's objection was overruled by the court, and said ruling seasonably and at the time excepted to, and the present bill of exceptions to said ruling, and to the part of the said charge excepted to, duly reserved, and which is now respectfully presented to the court for signature, by defendant, through his counsel.

S. MCC. LAWRESON,
CHARLES KILBOURNE, *Judge.*"

The only grounds of objection here stated are that the charge is prejudicial and not a legal and proper charge; and the question is whether this was a sufficient statement of the grounds of objection.

We think that in considering the degree of particularity with which grounds of objection must be stated a distinction should be made, in the first place, between an objection founded purely on law and an objection founded partly on facts; examples of the latter kind being objections to the admission of evidence, and objections to a charge because of its inapplicability to the facts of the case: and, in the second place, between an objection to the correctness of the legal proposition involved in the charge of the court, and an objection not to the correctness of the legal proposition, but to the adequacy or aptness of the terms made use of by the court in expressing it. The judge is presumed to know the law, and therefore, the correctness of a legal proposition involved in a particular part of his charge is fairly challenged by a mere pointing out of the particular part of the charge and a statement that it is not legal; but he is not presumed to know the facts, and is not presumed to be infallible in the aptness or sufficiency of the terms made use of by him in stating legal propositions, and therefore objections founded partly on facts, or founded on the inadequacy of the terms made use of in stating the law on the particular point involved, should specify the grounds on which complaint is made.

Viewing the instant case in the light of this distinction, we think that the grounds of objection were sufficiently stated to challenge the correctness of the legal proposition involved in the charge, but were not sufficiently stated to call the attention of the judge to any error resulting from the inapplicability of the proposition to the facts of the case, or from the inadequacy of the terms made use of in stating the law on the particular point involved.

Taking the charge as a whole, we can see in it no error of law; it is not incorrect to say that "affirmative evidence is rather to be believed than negative evidence when witnesses testifying to affirmative and negative facts are equally reliable, and are shown to have had equal opportunities for observation;" (State vs. Chevallier, 36 ALA. 84; State vs. Dorsey, 40 Ann. 742); and also it is not incorrect to say "that the jury are the sole and exclusive judges of the evidence, and that it is the duty of the jury to weigh the testimony of all witnesses, and that it is the province of the jury to accept or reject all or any part of the testimony of any witness, and that it is for the jury to judge of the credibility of witness."

The charge may be objectionable in that it does not explain what is meant by negative evidence as contradistinguished from affirmative evidence; and it is possible that the witnesses giving negative testimony had not only enjoyed equal opportunities for observation, but had exercised the opportunities, so that under the doctrine of the cases of Chevallier and Dorsey, cited above, their testimony was entitled to equal weight with the affirmative testimony; but if in these respects, and in the other respects specified in defendant's second bill, the charge was defective and objectionable, these were matters which the trial judge could have rectified if his attention had been called to them, and which the defendant cannot take advantage of, he having failed to call the judge's attention to them.

The motion for new trial was based on the same alleged error in the charge. In this motion the grounds of objection to the charge are stated to be that the charge was objectionable in that it "was misleading in that among other things it eliminated from consideration the probability or improbability of affirmative or negative evidence, and the number of witnesses supporting the affirmative and negative statements respectively, and that such a charge trenching on the province of the jury as sole judges of the facts, and though inadvertently amounted to a hint of the court's preference for affirmative testimony; and prejudiced defendant whose defence was based on the negative testimony of many witnesses, in itself probable—said witnesses being State as well as defendant's witnesses; and the case of the State supported by the positive testimony of only one witness not positively discredited." It is needless for us to enquire whether these grounds were good or not, they not having been urged timely, that is, before the retirement of the jury. It is well settled that objections

State ex rel. Teague vs. Judge.

to a charge must be urged before the retirement of the jury and cannot be urged afterwards. State vs. Ryan, 30 Ann. 1176; State vs. West, 45 Ann. 928; State vs. Walker, 39 Ann. 19. See also the cases cited in the first part of this opinion.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed at the costs of the appellant.

No. 14,260.

STATE *ex rel.* WALTER TEAGUE VS. HON. BEN P. EDWARDS, JUDGE THIRD JUDICIAL DISTRICT COURT.

SYLLABUS.

The statute clearly provides that no one shall be prosecuted for any fine unless the prosecution be instituted *within six months* of the time of incurring such fine, and does not admit of a delay within which to institute proceedings, as in case in which one is prosecuted for an offense barred by the prescription of twelve months from the time the crime is made known to an officer having authority to direct the prosecution.

The recovery of the fine is *absolutely* prescribed in six months from the time the fine was incurred and is not negated by the averment in the information that it was filed within six months after the commission of the act was made known to an officer authorized to prosecute.

A PPLICATION for Writs of Prohibition and *Certiorari*.

Richardson & Richardson, for Relator.

Walter Guion, Attorney-General, and *John C. Theus*, District Attorney, (*Lewis Guion*, of Counsel), for Respondent.

The opinion of the court was delivered by

BREAUX, J. Relator contending that the prescription of six months bars a prosecution for a fine absolutely, asks that the Judge of the District Court be prohibited from enforcing the judgment of the court

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111 1089

107 49
d123 180
d123 181

against the relator, and he further asks to be discharged, and that his bond be cancelled.

The facts are these: A charge was preferred against the relator, Teague, by information of the District Attorney, for retailing intoxicants without a license. The information was filed on the 2nd of December, 1901; on the day that the information was filed the defendant, relator here, was tried and convicted. He then applied for a new trial which was not granted. He was condemned to pay a fine of one hundred dollars and costs, or to work the public works. Not having the right of appeal he sues for the interposition of this court's authority in his behalf, under its supervisory jurisdiction.

The Judge of the District Court in his answer to the preliminary order issued, states that the bill of information contained the averments, viz.: that the offence charged was not within the period fixed by the statute, made known to an officer authorized to direct a prosecution; and he adds, that, the defendant, relator here, offered no evidence whatever to traverse this allegation. More than eight months had intervened between the day the act was charged to have been committed and the day that the information was filed.

Defendant's and relator's contention is that under R. S. 986 there are two terms of prescription; that the first term, the *twelve months'* prescription can be *negatived*, but that it is different as to the *six months* term of prescription, for the reason that the statute contains special provision applying to the first, and not to the second or six months term of prescription.

We are called upon to determine whether the District Judge erred in overruling the plea of prescription invoked by the defendant.

We think that the plea should have been sustained. The statute of 1855, Number 121, embodied as to prescription in Article 986, of the Revised Statutes, provides, that, prosecutions are to be brought within one year after the offence has come to the knowledge of a public officer; murder, arson, robbery, forgery and counterfeiting excepted.

This provision is in itself complete. It applies to all offenses barred by the prescription of twelve months. Immediately after, in another and complete sentence of the section of the statute, it provides, viz.:

"Nor shall any person be prosecuted for any fine or forfeiture unless the prosecution be instituted within six months from the time of incurring such fine or forfeiture."

This is an action for the recovery of a fine and six months governs the prescription. We have searched in vain for a provision of law which would justify the conclusion that the words, "Within one year next after the offense shall have been made known to a public officer" bears application to the prescriptoin of six months. The language of the statute is plain enough as related to fines and forfeitures, that is, that they are barred by prescription of *six months from the time of incurring such fine or forfeitures*.

We have carefully examined the articles of the Revised Statutes and the amendments made by Statute 50 of 1894, and noted the repetition in each of the special provisions relative to prescription without any changes as related to the prescription of six months.

The words of the statute, viz.: "Nothing herein contained shall extend to any person absconding or fleeing from justice" evidently refers to both classes of crime; that embraced within the twelve months' prescription and that embraced within the six months' prescription, for it is inserted after and follows both. But it is different as relates to the prescription of twelve months; the provision precedes the limitation applying to fines and forfeitures and under no rule of construction the words referring to the former crimes subject to the "Twelve months prescription from the date of the offense was made known to an officer" can be held as applying to the provision following limiting the time as relates to fine or forfeiture to six months. Antecedents are not to be extended to what follows unless clearly so intended. *Gast vs. Assessors et al.*, 43rd Ann. 1104.

We can conceive of no good reason why the language of the section just referred to must be taken and construed in connection with the language of the section just preceding in which it is announced that prescription does not run until the commission of the offense has been made known to an officer having the power to direct an investigation and prosecution. That construction would be in direct opposition to the positive terms limiting the time to six months when a fine has been imposed or a forfeiture decreed.

We are not of the opinion that the prescription can be negatived by averments which, in words not to be misunderstood, apply only to crimes and offenses prescribed by twelve months from the time before mentioned. We would not be warranted in holding that a rule applying to the prescriptive period of twelve months applies to the prescriptive

period of six months as well. One, by the language of the law is placed on a different footing from the other, for, we presume, sufficient reasons. The latter is of a less serious nature and the law-making power may have intended, not to subject it to delays as relates to the possibility of prosecution, but to make it subject to prescription to be computed, as to time, from the day the act charged was committed.

These being our views, it only remains for us to make the writs of prohibition and *certiorari* perpetual, sustain the plea of prescription of six months as barring all proceedings against defendant, set aside the verdict and sentence; order the accused to be released and his bond cancelled, and it is accordingly so ordered, adjudged and decreed.

No. 14,096.

L. S. GAUTHIER VS. F. S. CASON, *et als.*

SYLLABUS.

1. Where a person's property is seized by the sheriff in execution of a *fi. fa.*, the owner's possession is broken and replaced by that of the sheriff. It is the sheriff who, thereafter, holds possession of the property for delivery to the purchaser at the subsequent judicial sale. The owner's possession being broken after a judicial sale to another, he stands as a third person to the property.
2. Where the same property is afterwards sold at a tax sale under an assessment made in the name of the purchaser at the execution sale, there is no legal reason why the original owner should not hold possession under and for the tax purchaser, nor why he should not later purchase it from him and own and possess it for himself. Under such circumstances, his title would be a new title, and he could, for purposes of prescription, tack on his author's possession to his own.
3. Where, under the pleadings, the purchaser of property at a tax sale is admittedly in good faith up to citation upon him in a petitory action, prescription *acquiesci causa* runs in his favor and those holding under him from the date of the tax sale.

A PPEAL from the Twenty-Fifth Judicial District, Parish of Tangipahoa—*Reid, J.*

E. North Cullom, Bolivar E. Kemp, Thomas Kleinpeter, Thomas H. Thorpe, and Andrew Jackson Morgan, for Plaintiff, Appellant.

Stephen D. Ellis, for Defendants, Appellees.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 7th of February, 1885, the Sheriff of the Parish of Tangipahoa, through one of his deputies, adjudicated to the plaintiff, L. S. Gauthier, in execution of a judgment he had obtained against Thomas Calmes, property described in the sheriff's return and sheriff's deed of sale, as the S. E. 1-4 of S. E. 1-4 of Section 14 T. 5, S. of R. 7 E., containing 39 78-100 acres, also N. W. 1-4 of N. E. 1-4 of Section 23, T. 5, S. of R. 7 E., containing 9.59 acres, also W. 1-2 of S. W. 1-4 and Frac. S. W. 1-4 of N. W. of Sec. 13, T. 5 S. of R. 7 E., also 40 acres known as the Dr. Lea tract in Sec. 14, T. 5, S. R. 7 E., in the Greensburg Land District of Louisiana, containing 128 33-100 acres, together with all the buildings and improvements thereon, "for price of *Four Hundred Dollars.*"

The sheriff's return was recorded in the sheriff's book of sales on the 17th of February, 1885, in the sheriff's book of sales in the clerk's office of Tangipahoa on the 19th of February, 1885, and in the conveyance book of the Records of the Parish of Tangipahoa on March 20, 1896.

The plaintiff in his petition in this suit avers himself to be still the owner of the property adjudicated to him. He avers that the forty-acre tract referred to as the tract known as the Dr. Lea tract was the N. E. 1-4 of the N. E. 1-4 of Sec. 23, in T. 5, S. R. 7, E., but was erroneously described in the sheriff's deed to petitioner as being in Section 14 (Fourteen), that his said property was correctly described in the assessment rolls of the Parish of Tangipahoa. He avers that the said tract containing 128 33-100 acres was entered by N. B. Calmes on March 19th, 1855. That the forty-acre tract known as the Dr. Lea tract was purchased of him by N. B. Calmes and subsequently purchased on 21 April, 1883, by Thomas Calmes, at a sale for taxes; that said lands were assessed for the years 1883 and 1884 in the name of Thomas Calmes, for the years 1885 and 1886 and 1887 in the name of petitioner.

That he paid the State and parish taxes assessed upon said lands for the years 1884, 1885 and 1886.

That he was, to the knowledge of the sheriff and tax collector, in and for said parish, domiciled at Choupique, his post office being at Cottonport, in the Parish of Avoyelles, State of Louisiana, during all of said years, and also in 1888, therefore he was not an unknown person in legal intendment and whose residence was unknown to said officer.

That on the 16th day of June, 1888, F. P. Mix, sheriff and *ex-officio* tax collector of the Parish of Tangipahoa, deeded the following described pieces of land, situated in said parish, describing them as belonging to petitioner, to-wit:

128 acres of land 39 acres S. E. 1-4 section 14, T. 5, R. 7 E., 9 39-100 acres N. W. 1-4 of N. E. 1-4 Sec. 23, T. 5, R. 7 E., and W. 1-2 of S. W. 1-4 of fractional S. W. of N. W. 1-4 Sec. 13, T. 5, R. 7 E., also 40 acres, the Dr. Lea tract, in Section 14, T. 5, R. 7 E., unto F. S. Cason, of said parish, for the State and parish taxes of 1887, amounting, together with interest and costs, to the sum of \$15 19-100, without notice of any kind to petitioner.

He alleges that he had no agent or attorney authorized to represent him in said parish to whom notice could have been given, and that previously to 1888 he attended to his business there himself.

That Section 22 of the Act of 1888 prescribes the required time for listing and for estimating the valuation of all real and personal property and fixes it to be done on or before the first day of June of each year. It provides that the assessor should give notice by publication in some newspaper, published in the parish for ten days, that the listing of the property has been completed and the estimated valuation made thereon by the assessor, and that the same would be exposed in the office of the assessor for a term of twenty days, beginning next after the ten days required for notice shall have expired. He avers that the sale made to F. S. Cason, complained of having been made on the 16th of June, 1888, was made before the expiration of the prescribed time of which he had no notice by publication in a newspaper or otherwise. That as the sale was made on the 16th of June, the listing and valuation of the property of the assessor must have been completed on the 17th of May, next preceding that date. That the sheriff in his *proces*

verbal says he advertised the property first on the 26th of May, and it follows that the listing and valuation of it must, under the law, have been completed and exposed as early as the 17th of April of said year, supposing that not a day was lost *ad interim*. The board of reviewers did not meet until the first Monday of July following; that petitioner had no notice either of the completion of the listing of the property or of the appointed time for the sale or of the work of the reviewers. He avers that the description of the landed property published by the said sheriff and *ex-officio* tax collector, was incorrect, and not such as was required to be published; for instance, he advertised 128 acres without giving any description; 39 58-100 acres in S. E. 1-4 Sec. T. 5, S. R. 7, E., whereas the lands of petitioner contains 39 78-100 acres. The 128 acres mentioned in the sheriff's advertisement and *proces verbal* to Cason, should have been described as the N. E. 1-4 of the N. E. 1-4 of Section 23, and not Section 14 in T. 5, R. 7, E., and it should have been described as containing 128 33-100 instead of 128 acres, with no description otherwise. The Lea tract, sold by the sheriff to said Cason, as aforesaid, he failed to describe at all, further than to say: "Also forty acres, the Lea tract, in Sec. 14, T. 5, R. 7," whereas the said land of petitioner lies in the N. E. 1-4 of N. E. 1-4 of Section 23 in T. 5, S. R. 7, E., all of which appears by an entry made by N. B. Calmes March 19th, 1855, bearing the number 2179 in the United States Land Office.

That said tract was sold for State and parish taxes by F. P. Mix, Sheriff of Tangipahoa parish, *ex-officio* tax collector, on the 21st of April, 1883, Thomas Calmes becoming the adjudicatee and he being petitioner's author.

Plaintiff avers that the sheriff sold said lands as advertised by him *in globo*, whereas the law required such sales to be made by the sheriff in such manner as to make each tract of listed land, pay the tax on it and not any other tax. That as the police jury, sitting as a board of reviewers, could not, under the law, have officiated as such before the first Monday of July, the tax collector had not the authority or power to sell land for taxes until that work had been done and notices given. That, therefore, the sale to Cason was null *ab initio* and *in toto*, and in no respect operated a divestiture of petitioner's title thereto as the owner of the land claimed.

That he tenders unto the said Cason, adjudicatee of said lands, the

sum of \$15 90-100, paid by him to the tax collector, and twenty per cent thereon, with costs, interest and penalties, notwithstanding the fact that the deed to him from the tax collector embraces and includes only a small portion of his land as would appear by reference to the respective titles annexed to his petition.

That Cason and his successors in title are occupying and claiming as owners all of petitioner's land, as first described, contrary to law, and in violation of petitioner's rights.

That Cason sold, or pretended to sell, the land so acquired at tax sale to Mrs. Mary Calmes, April 25th, 1893; that the land was at the time of filing his petition occupied by Dallas Calmes and Mrs. Mary Calmes.

He prayed that S. F. Cason, Mrs. Mary Calmes, and Dallas Calmes be cited, that petitioner have judgment decreeing him to be the owner of the N. E. 1-4 of Section 23, in Township 5, S. R. 7, E., also 39 78-100 acres, being the S. E. 1-4 of S. E. 1-4 of S. E. 1-4, Sec. 14, T. 5, S. R. 7, E., also the N. W. 1-4 of N. E. 1-4 of Section 23, T. 5, S. R. 7, E., containing 9 59-100, also W. 1-2 of S. W. 1-4 and fractional S. W. 1-4 of N. W. 1-4 of Sec. 13, T. 5, S. R. 7, E., said tract aggregating two hundred and fifty-six and 66-100 acres, and being the identical tract purchased and adjudicated to petitioner by the sheriff of the Parish of Tangipahoa on the 21st of April, 1883, in satisfaction of his judgment against Thomas Calmes. Petitioner further prayed for rents, averring the possession of the defendants to have been in bad faith. S. F. Cason answered. After pleading the general issue he admitted that he purchased the lands firstly described in plaintiff's petition at tax sale, made by the sheriff and tax collector, on the 16th of June, 1888, for the unpaid taxes, due by the plaintiff, for the year 1887, and that title to same was made to him by F. P. Mix, the then sheriff and tax collector, and same was duly recorded in the conveyance book of the Parish of Tangipahoa. He averred that under said title he at once took possession of said lands and had same in peaceable and open possession until April 26, 1893, when he sold the same to Mrs. Mary Calmes, by private act, acknowledged before J. A. Reid, and duly recorded in the conveyance records of the Parish of Tangipahoa.

He admitted that he paid the price for said land as stated by the plaintiff, and averred that he paid the taxes on the property for the years 1889, 1890, 1891 and 1892, amounting in the aggregate to Ten Dollars.

He denied that any of the legal formalities were neglected by the sheriff and tax collector leading up to said tax sale, and maintained that said sale was made in strict conformity to law, and same is valid and good.

He pleaded the prescription of two and three years as a peremptory bar to plaintiff's right of action. He contingently prayed in reconvention for judgment against the plaintiff for the purchase price and taxes since paid and for interest thereon.

Mrs. Mary Calmes answered, first pleading a general denial. She admitted that she was in possession of the property, firstly described in plaintiff's petition, she averred that she purchased the same from F. S. Cason on April 25, 1893, by private act acknowledged before J. A. Reid, notary public, and same was duly recorded in Tangipahoa parish in the conveyance office, that Cason acquired the same at tax sale, as recited in his answer, the allegations of which she adopted and made part of her own answer. She denied that plaintiff was then or ever had been the owner of the North East quarter of Section 23, Township 5, South Range Seven, East. She averred that she purchased said land from N. B. Calmes by private act, which she annexed, and same was acknowledged before J. A. Reid, on the 26th of April, 1893, and said act was duly recorded on May 22, 1893, in the conveyance book of Tangipahoa Parish.

She averred that she possessed said lands for S. F. Cason from June 16, 1888, until April 25, 1893, when she became owner as stated. That she had been in the open, undisputed, peaceable and quiet possession, she and her vendor, for more than ten years, and she specially pleaded the prescription of two, three, five and ten years as a peremptory bar to plaintiff's right to recover.

She averred that she had, in good faith, put up a number of valuable buildings on the property, and had made permanent valuable improvements thereon and thereto. She prays that plaintiff's demand be rejected, and that she be decreed to be the owner of the land bought by her from S. F. Cason, and also the North East quarter of North East quarter of Section Twenty-three, Township Five, South of Range Seven, East. She prayed contingently in reconvention for the value of her improvements, and that no possession be given to plaintiff until said judgment should be paid.

The District Court rendered judgment in favor of the defendant, rejecting plaintiff's demand, and he appealed.

OPINION.

NICHOLLS, C. J. Plaintiff's action is a petitory one, directed against Dallas Calmes and Mrs. Mary Calmes as defendants in possession.

He bases his right of ownership upon a judicial sale made in execution of a judgment which he had obtained against Thomas J. Calmes, at which sale he became the adjudicatee. He refers in his petition to a tax sale, made of the property in 1888, by F. P. Mix, sheriff and ex-officio tax collector of Tangipahoa Parish, in enforcement of taxes of 1887, assessed against the property in his name, at which it was adjudicated to S. F. Cason, and who subsequently transferred the same to his mother-in-law, Mrs. Mary E. Calmes. He avers that for a number of reasons recited that the sale to Cason was null and void *ab initio*, and did not divest him of his ownership.

He prayed that S. F. Cason, Mrs. Mary E. Calmes, and Dallas Calmes be cited; that he be decreed owner of the property, which he declared to be the identical property adjudicated to him at the sheriff's sale, and he further prayed judgment of Cason and each other of said parties in possession of his said lands, from the service of his petition, for the rents thereof at the rate of five dollars per acre, until they give up said lands, their possession of same being possession in bad faith, if continued after service of citation.

Mrs. Mary Calmes is the widow of Thomas J. Calmes, against whom the plaintiff, Gauthier, had obtained and executed judgment. Plaintiff therefore is committed, so far as he is concerned, to the ownership of the property he claims having been originally in Thomas J. Calmes, and that he, plaintiff, divested him of that ownership through the execution sale at which he purchased. It appears that the plaintiff never took possession corporeally of the land he alleged to have purchased after the adjudication to him, though he paid taxes upon it for several years.

Mrs. Mary Calmes seems to have been living on the place at the time of the sale, and has never left it. While she may have been there on sufferance, there is nothing to show that her occupation was by consent or agreement. Where her husband was at the time does not appear. The property was adjudicated in 1888 to S. F. Cason, at tax sale. He notified Mrs. Calmes of his purchase, and from that time forward, up to 1893, when he conveyed the property to her, she held the property for him, and from that time forward for herself. There was no legal obstacle after Cason became the adjudicatee at the tax sale, in his tak-

ing immediate possession, and no legal obstacle after Cason became the adjudicatee, in Mrs. Calmes holding possession, for him thereafter. If Gauthier became the owner of the property, it was not through a conventional sale, and Calmes and his wife were under no legal obligation to hold the property for delivery to him.

They became third parties as to the property from the time of the adjudication, and charged with no duty to Gauthier, Cason had no connection whatever with him. He could legally take possession himself or he could place it in the possession of a third person for him. None of the parties are charged with being in bad faith, on the contrary, bad faith in all parties is expressly made by plaintiff's own petition to date from the service of his petition upon them. Tax titles are *prima facie* valid. They furnish a commencement for the long prescription of ten years. When adjudicatee took possession in good faith and was permitted to hold it undisturbed for so long a period plaintiff was bound to know that other parties were in possession of the property, and it was gross negligence on his part not to have taken steps to protect his interests sooner. If this property was his, it was his duty to have had it assessed and to have paid the taxes. He was bound to know that he was delinquent and that under the law, as it now stands, the property would be sent to sale at a fixed date. Cases of this kind present no features of hardship or harshness, where men of full age are the parties in interest, on the contrary, this tardy advance of claims is generally at the expense of third parties.

Plaintiff urges that at the date of the purchase by Mrs. Calmes from Cason she was a married woman and the purchase by her was an absolute nullity. We have no reason to know that she was a married woman at that time, for in the sale from N. B. Calmes to herself, made almost simultaneously, she was described as the former wife of Thomas J. Calmes, but whether she was or was not, the fact would not advance the plaintiff. If Mrs. Calmes did not buy, either Cason remained the owner with Mrs. Calmes holding possession for him, or the property went out of the ownership of Cason into that of the community of Calmes and his wife. In either event Gauthier's possession had certainly been broken by Cason's possession.

If the husband was alive at the time he has never repudiated his wife's purchase, and the plaintiff cannot challenge Mrs. Calmes' want of authorization from her husband. There was no legal impediment to Calmes himself purchasing from Cason at that time. After the

adjudication to Gauthier he was free to acquire a new title and to hold by adverse possession under Cason's claim of ownership. We need not under our view of the situation, under the pleadings and the facts of this particular case, discuss the matter of the tax sale. There is one matter which we will allude to before closing; it is the claim of the plaintiff to the ownership of what is referred to throughout as the Lee tract, and as being in Section 14, Township 5, South Range, 7 East.

There has been no correction of that description; if it was wrong plaintiff purchased it by that description, and it was assessed and sold at tax sale by the same description. He says it originally belonged to Napoleon B. Calmes, was purchased by Dr. Lee, was sold at tax sale as Dr. Lee's property and purchased at that sale by Thomas J. Calmes, but while there is evidence in the record that Napoleon B. Calmes had at one time purchased lands, there is none that Dr. Lee ever purchased it from him. On the contrary, the tract which plaintiff claims was bought by Lee from N. B. Calmes, was sold by the latter himself in 1893, to Mrs. Mary Calmes, the defendant to this suit.

For the reasons assigned, it is ordered, adjudged and decreed that the judgment appealed from be, and the same is hereby affirmed.

No. 14,252..

STATE OF LOUISIANA VS. JOE HEARD.

SYLLABUS.

1. A conviction for selling one drink of beer to Ben Barnes, is not a bar to a prosecution for selling on the same day one flask of whisky to Austin Montgomery, unless the two sales are proved to have been one and the same transaction, constituting one sale.
2. The one word "Sunday" conveys all the meaning that is conveyed by the phrase "the twenty-four hours immediately following 12 o'clock Saturday night;" hence, under a statute forbidding stores to be kept open, or liquors to be sold during the twelve hours immediately following 12 o'clock Saturday night, it is sufficient to charge that the unlawful acts were committed on Sunday: especially is this so where in the title of the statute the word "Sunday" is used to designate the same forbidden space of time.
3. The hour at which the forbidden acts were committed need not be specified: it is sufficient to charge that they were committed on Sunday.

State vs. Heard.

4. Whether the mere opening of a store on Sunday, without making any sales, violates Act 18 of 1886, commonly known as the Sunday law, *quaere*. But every separate act of selling from said store on Sunday, constitutes a separate violation of said act, subject to separate prosecution and punishment.

A PPEAL from the Second Judicial District, Parish of Webster—
Watkins, J.

Walter Guion, Attorney-General, and *Thomas T. Land*, District Attorney, (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Stewart & Stewart, for Defendant, Appellant.

The opinion of the court was delivered by

PROVOSTY, J. The defendant was found guilty under an information charging him, as follows:—that he did “wilfully and feloniously keep his saloon open on Sunday and did then and there wilfully and unlawfully sell, barter and give to Austin Montgomery one flask of whiskey out of the stock kept in said saloon, contrary to the form of the statute,” etc.

The law thus charged to have been violated by the defendant is Act 18 of 1886, commonly known as the Sunday law, which reads, as follows:

“That from and after the 31st day of December, 1886, all stores, shops, saloons and all places of public business which are or may be licensed under the law of the State of Louisiana or under any municipal law or ordinance and all plantation stores are hereby required to be closed at 12 o'clock on Saturday nights and remain closed continuously for 24 hours during which period of time it shall not be lawful for the proprietor thereof to give, trade, barter, exchange or sell any of the stock or articles of merchandise kept in any such establishment.”

Defendant moved to quash the information on two grounds stated in the brief, as follows: “1st.—That the bills do not state that defendant opened his place of business at any time between the hours of twelve o'clock Saturday night and 12 o'clock Sunday night, or that he opened the place of business at any particular hour.

Second—That he had already been prosecuted, tried and convicted of the same offence and that he was twice put in jeopardy for the same offense. That if he had violated the law at all it was opening his

place of business on Sunday and that each separate sale at the same opening and during the same interview constituted but one act or offence, for which he could only be prosecuted one time. Hence, he pleads his former conviction in bar of this prosecution."

The first ground is not good. It was sufficient to allege that the reprobated acts had been done within the forbidden time, without specifying the hour; and this forbidden time was designated just as effectually by the single word "Sunday," by which it is designated in the title of the statute, as by the lengthier and more cumbersome expression by which it is designated in the body of the statute; the time comprised within the twenty-four hours immediately following 12 o'clock Saturday night, constitutes what is known as Sunday, and is described with perfect precision by that one word.

Nor is the second ground good. The acts charged in the two informations, though both charged as of the same day are not necessarily one and the same; the act of selling one drink of beer to Ben Barnes, for which the first conviction was had, is not the same as the act of selling a flask of whiskey to Austin Montgomery, which is the act charged in the second information: proof of the one act could not support a conviction for the other, and this is the recognized test for determining whether the first conviction is a bar to the second prosecution. We do not say that the two acts might not, in fact, constitute one and the same transaction, out of which the prosecution might carve but one crime, but we say that on the face of the papers they constitute two distinct transactions. It would have been admissible for defendant to prove their identity; but the proof in the case far from proving their identity proves their severalty: there is in the record an admission to the effect that the two sales were "to different parties at different times on the same day." Hence they were, in fact, separate transactions.

But defendant contends that what is made a crime by the statute is the opening of a saloon on Sunday, and not the making of sale on that day.

We cannot agree with that view. Whether the opening and the selling are not both and each made a separate crime, and might not both and each furnish matter for separate prosecution and punishment, might be a question; but certainly the selling is made a separate crime. All that part of the statute relative to opening might be stricken out and a complete statute be left denouncing the making of sales; and, on

the other hand, all that part of the statute forbidding the making of sales might be stricken out and a complete statute be left making it a crime to open. The statute, in its title, is stated to be one "requiring all stores, &c., to be closed on Sunday, and forbidding all selling, &c.," that is to say, the statute is stated to have a twofold object, first, to require stores to be closed; and second, to forbid sales. It is very questionable whether stores may be kept open, even although sales are not made; but it is very certain that the business of selling cannot be carried on on Sunday, even behind closed doors.

In defendant's brief we find the following: —

"The American & English Encyclopaedia of Law states the law as follows: "A conviction for making a sale on Sunday in contravention of a statute prohibiting sales on that day is a bar to subsequent prosecution for making other sales on the same day." (See Vol. 17, p. 604, 2nd Ed.) For this authority the author refers to *Crepps vs. Durden*, 2 Cowp. 640; *People vs. Cox*, 107 Mich. 439, and *Commonwealth vs. Moses*, 15 Pa. Co. et. 224."

Of the decisions here referred to we have had access to but one, that of *People vs. Cox*, 107 Mich. 439; 65 *Southwestern Rep.* 283. The syllabus of that decision, which correctly reflects the text, is as follows:

"1. 3 How. Ann. St. para. 1997 a., declares that all keepers of bawdy houses, or houses for the resort of prostitutes, shall be deemed disorderly persons. Sec. 9286 provides that every person who shall keep a house of ill-fame, resorted to for the purposes of prostitution, shall be punished. Held, that a person cannot be punished for the same transgression under both statutes.

2. After a conviction for keeping a disorderly house defendant can not be convicted of the same offence on a date anterior to the former indictment, as the offence is a continuing one."

It is clear that the decision does not bear out the proposition in support of which it is cited. Plainly, the keeping of a bawdy house is a continuous transaction constituting one offence; and being one transaction it cannot be cut up into parts for the purpose of making out several crimes. Doubtless, the two other cases cited would, on examination, be found equally unreliable as authority for the proposition they are cited in support of; otherwise they would be isolated cases. The well established rule is that where the selling of liquors is prohibited, each separate sale constitutes a separate offence.

"Successive sale may clearly be successively prosecuted." Wharton, Crim. L., 7th Ed., para. 566.

It is therefore ordered, adjudged and decreed that the judgment of the lower court herein be affirmed at the costs of the appellant.

No. 14,140.

JOHN T. PRUDE VS. D. H. SEBASTIAN ET AL.

SYLLABUS.

A person cannot claim damages from another for loss of prospective profits of his business by reason of his having forced him to discontinue it by threats, where it is shown that the business which was discontinued was the illegal selling of intoxicating liquors without a license.

A person cannot make the forced discontinuance of an illegal act simply through threats, the foundation of a legal right.

Ex dolo malo non oritur actio. A person seeking damages should come into court with clean hands. (State vs. McMaster, 2 La. 381; Boulard vs. Calhoun, 18th Ann. 445).

A PPEAL from the Twelfth Judicial District, Parish of DeSoto.—
Lee, J.

George E. Head, and C. C. Egan, for Plaintiff, Appellant.

Charles W. Elam, for Defendant, Appellee.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff sued to recover a judgment *in solido* against five citizens of DeSoto parish, for damages which he alleged he had suffered from their acts. He alleged that for several years prior to and up to the spring of 1890, he had owned and carried on a mercantile business in the town of Benson in that parish, his establishment constantly carrying a stock of drugs, chemicals, etc., from six hundred to one thousand dollars in value. That he realized an annual net profit out of the proceeds of the sale of said merchandise of from one thousand to fifteen hundred dollars a year. That during the winter and spring of 1899-1900, while he was lawfully engaged in carrying on his said business, he, and his agent in charge of the same, began to receive at stated intervals threatening letters, and open threats were freely indulged in and public meetings of an incendiary

character held in said town, to each and all of which the defendants were parties, participants and accomplices wilfully and without excuse or warrant in law, which letters and public meetings and demonstrations had for their sole object and purpose to brow beat, terrorize and intimidate him and his agent and thereby force him to close up his establishment and break him up in his mercantile business; that in said letters and at said meetings threats of violence and force were made and concurred in on the part of the defendants against him and his business, and they more than once went so far as to threaten to burn him out if he did not at once discontinue his said business, and his said agent did not at once depart from said town of Benson. That on account of said threats and public demonstrations he was put in fear, harrassed and made afraid to longer continue his said mercantile business, and, therefore, on or about the month of March, 1900, he closed his doors and discontinued the same, notwithstanding that he had previously paid his license and contracted for insurance and for rent of the building in which his business was conducted for the year 1900; that the said stock of goods at once became dead capital and up to the time of suit had perished and deteriorated until it was nearly if not entirely ruined; that said stock of goods was formerly well worth the sum of seven hundred and fifty dollars; that he had thereby suffered damages to his feelings, credit and general reputation and standing in the sum of fifteen hundred dollars, and had thereby lost and failed to realize the sum of fifteen hundred dollars profit out of the said business.

The defendants prayed *oyer* of the threatening letters referred to and called for a detailed statement of the losses and damages he claims to have sustained.

In reply to the demand for a detailed statement of losses and damages, plaintiff filed, besides the claim for \$1500 for profits lost, the following specifications of loss and damage:

Loss of drugs and medicines	\$550 00
Loss of confectionaries	20 00
Loss of stationery and toilet articles	130 00
Damage to credit	750 00
Damage to general reputation	400 00
Damage to feelings	350 00
<hr/>	
Total	\$2,550 00

In answer to prayer for *oyer* plaintiff filed the following document as the cause of the damages sustained:

BENSON, LA., March 19, 1900.

Mr. John T. Prude, Cook, Louisiana.

Dear Sir: The citizens of Benson came together this morning to take action in regard to the unlawful selling of whiskey here by Dr. Jno. Walker. Matters having come to that pass, until the good people resolved not to submit longer. In said meeting of the citizens it was resolved that Dr. Walker must leave this place, the people placing no confidence in his promise to quit dealing out whiskey. It was further resolved that you be notified that we will no longer submit to the sale or unlawful handling of whiskey in our midst. Said resolve, further, that we notify you that we have no objection to your running a drugstore here, provided you place a moral, sober man in charge and that whiskey cease once for all.

That, in the event whiskey selling is resumed here, you are hereby notified that you must assume the consequences of such actions as the citizens may take."

Signed:

R. Y. BEST.

D. H. SEBASTIAN.

I. J. BEST.

R. F. BEST.

R. T. PHILIPPS.

And numbers of other citizens of Benson.

Defendants answered. After pleading the general issue, they admitted that they had signed the letter produced and filed by the plaintiff.

They then alleged that the plaintiff had been a long time carrying on, under guise of its being a drugstore, an establishment at which whiskey and other intoxicating liquors were habitually sold in contravention of law; that the establishment was a disorderly house and a public and private nuisance. That the plaintiff had placed a person named Walker to conduct the business, for the reason that he held the diploma of some college as a physician, and he could and did constantly sell liquors illegally, under claim of its being sold for prescriptions for sickness. They set out what they alleged to be a history of plaintiff's action and that of Walker in that connection in the parish. They averred that matters reached such a pass that the

grand jury found one or more indictments against Walker for selling intoxicating liquors without a license; that, upon trial, he was found guilty, convicted and fined; that, notwithstanding such conviction and fine, the plaintiff and Walker continued in the same course, which culminated by the killing of one boy by another, the boy doing the killing being under the influence of liquor obtained at plaintiff's so-called drugstore; that forbearance having ceased to be a virtue, defendants and other citizens of the community on the heels of the killing held a mass meeting and adopted the resolutions filed in the case; that the same contained no threat of violence to person or property; did not require or suggest that plaintiff should cease to operate a legitimate drug business, but was intended to signify to plaintiff that if his illegal business of selling intoxicating liquors was not stopped, the citizens would see that he should be prosecuted to the full extent of the law; that said resolutions had no effect, and plaintiff and Walker continuing their illegal business, an indictment was found against them under which they were tried, found guilty and sentenced; that it was only then that they ceased operating their business, and the cessation of the same was caused by said sentence and the imprisonment of Walker, and not by the resolutions which had been adopted and signed some time before the mass meeting; that defendants made no threats against the plaintiff and did not force him to close his business; that subsequent to the said conviction plaintiff ceased business in the town and removed his stock of goods therefrom; that he had since sold his goods and had suffered no loss thereon.

They denied that plaintiff had suffered any injury to his feelings, credit or general reputation by reason of any act of theirs, and averred if he had suffered any injury, it was the result of his own acts.

Assuming the position of plaintiffs in reconvention, they averred that plaintiff's suit had been promoted by malice and a spirit of revenge and to annoy and harass them; that they had been put to great expense and to great trouble, annoyance and loss of time, and they would have to pay attorneys' fees for defending the suit. They prayed for judgment in reconvention for fifteen hundred dollars.

The case was tried by a jury which returned a verdict in favor of the defendants and against the plaintiff.

The plaintiff moved for a new trial, on the ground that the verdict was contrary to the law and the evidence. The new trial was refused, and judgment was rendered rejecting plaintiff's demand and dismissing his suit with costs. Plaintiff appealed.

We have examined the evidence in this case with great care. We are satisfied that the verdict of the jury and the judgment of the Court were correct. Plaintiff was unquestionably, at the time of the mass meeting and the adoption by it of the resolutions referred to in the pleadings, conducting an establishment designated by him as a drugstore, which was in reality a place for the selling of intoxicating liquors, without a license, under guise of being sold for medicinal purposes, under a physician's certificate. There was a small stock of old drugs in the building, of which there was an occasional sale, but the bulk of the business consisted in the sale of intoxicating liquors. The drugstore *per se* was not a paying investment, and we do not think was expected to be such. The mass meeting and resolutions adopted by it do not seem to have placed the plaintiff in fear, as the establishment was kept open after the letter in the record had been delivered to him. The stock, such as it was, was withdrawn by the plaintiff at his leisure and the greater part of it lost to the plaintiff, according to plaintiff's own testimony, not by reason of any acts of the defendants, but because of its being taken away from Benson in barrels of sawdust which became wet and caused the labels on the jars and bottles to fall off, making it impossible to ascertain what their contents were. Plaintiff testifies that he has still the stock on his hands, but that it is unsaleable.

We are convinced that the breaking up of plaintiff's establishment was due to prosecutions brought against Walker and himself for selling liquors without a license and their conviction under the charge, coupled with the fact that the carrying on of the "drugstore," as such, would be a losing business.

If plaintiff's business, prior to his discontinuing it in Benson, was remunerative, it was from that portion of the same which represented the illegal sales of intoxicating liquors; but even were it remunerative as a whole, we could have no means of separating the profits resulting from legitimate and from illicit trade. Plaintiff could certainly not expect a court to award him profits on an illegal business. Cooley on Torts, Section 43, declares that "a person cannot make his own illegal action the foundation of a legal right."

"Therefore, if, as a consequence of his own illegal action, he suffers a wrong, he must not look to the law for redress. *Ex dolo malo non oritur actio*. He has invited what has come, and he must accept it." That proposition may be too broadly stated, but we think it applicable to this particular case.

State ex rel. Johnson vs. Judges.

In *State vs. McMaster and Beckwith* (2 La., 331), this Court said that "one whose conduct has somewhat induced a quasi offense can recover but a bare indemnity," while in *Boulard vs. Calhoun*, 13 Ann. 445, it declared that litigants should present themselves with clean hands, and one who invokes from the justice of the country large vindictive damages for a violation of sacred rights guaranteed by its laws should take heed that his own habitual violation of the laws has not made him a nuisance to the community where he resides. We will not undertake to discuss the precise circumstances under which no redress whatever should be accorded and those where some, though limited, redress should be given.

In the case at bar no violence to person was attempted and no attack upon property was made. Defendants went no further than to threaten the plaintiff. He construed the threat to mean that the citizens of Benson would thereafter do him personal injury and destroy his property. Defendants deny that such was the purpose of the people. However this may be, the result shows that no attack was made either on plaintiff's person or his property. Plaintiff did not alter his conduct by reason of the threat, and the evidence shows no pecuniary damage resulting to him from it. We see no ground for supposing that the defendants, through any act of theirs, caused injury to plaintiff's feelings, credit or reputation.

For the reasons assigned, it is ordered, adjudged and decreed that the judgment appealed from be, and the same is hereby affirmed.

No. 14,292.

STATE EX REL. PETER JOHNSON ET AL. VS. JUDGES COURT OF APPEALS,
PARISH OF ORLEANS.

SYLLABUS.

1. Appellate courts have jurisdiction of incidental demands, and, particularly, over-costs, such as depend on the event of a suit which are to be paid after its termination.
2. The judgment is intended to embrace within its terms all questions regarding costs. If, for any reason, there remains an undecided question regarding the costs, after the decision has been rendered, and a question of interpretation or construction arises, the court by which the judgment was rendered, is the court of competent jurisdiction.

107	69
113	1076
107	69
119	390
1120	93
107	69
121	802
107	69
1124	1000

State ex rel. Johnson vs. Judges.

3. The Court of Appeal had not rendered the judgment on appeal in which the costs were incurred. The judgment was rendered by the Supreme Court, and this court is vested with jurisdiction of a rule to tax costs in its own judgments.

A PPLICATION for writ of *mandamus*.

Dinkelspiel & Hart, for Relators.

Respondent judges for themselves.

The opinion of the court was delivered by

BREAUX, J. Plaintiff appealed from the District Court to the Court of Appeal, to obtain a reversal of the judgment of the District Court in matter of costs.

Originally, plaintiff sued the City of New Orleans, and on appeal to this court, the judgment of the District Court was annulled. *Johnson et al. vs. New Orleans*, 105 La. 149. The decree in the case just referred to, is: "That the judgment appealed from be avoided and reversed, and it is now ordered and decreed that the injunction herein sued out be dissolved, and the demand of plaintiffs be rejected at their costs in both courts."

It appears that after this judgment had become final a rule was taken in the District Court against Peter Johnson *et al.* by the City of New Orleans, and the St. Charles Street Railroad Company, alleged intervenors in the case, asking that costs be taxed and for an execution for the costs taxed. The amount of the costs claimed was three hundred and eighty and 30-100 dollars. This rule was made absolute by the District Court. From the judgment, plaintiffs in the original suit, Peter Johnson *et al.*, appealed to the Court of Appeal. Peter Johnson *et al.* were not heard on the merits of their cause for the reason that that court, of its own motion, dismissed the appeal for want of jurisdiction, *ratione materiae*.

The complaint here of Peter Johnson *et al.* is that the Court of Appeal erred in dismissing the appeal, for the reason that the amount involved is less than two thousand dollars; that it was an independent and separate proceeding which had arisen after the decree of this court, to which we have already referred, had become final, and when there was nothing to be done toward the execution of the decree. The question is one exclusively of jurisdiction *vel non* of the Court of Appeal.

We state that which is well known: that costs are incurred during the course of the suit, but they are frequently taxed, and granted, only after the suit has been decided. Although the suit is terminated, the costs remain as an incident of the suit and one of its issues until they are paid.

The power to allow costs is dependent entirely upon statute. They are creatures of statutory law, which provides that they shall be taxed by the court having jurisdiction of the parties and of the main demand. The court adjudicates that all costs shall be paid when it passes upon the issues, and in case, for any reason, there remains an unsettled question as to who should pay the costs, we have not found, after considerable research, that the task of settling the question must be taken up by a court of another jurisdiction, although the amount itself is one within its jurisdiction. But, in the nature of things, as the principal demand was settled by another court, the incidental issues must remain until a final decision. That court retains jurisdiction to the end, and if, for any reason, any part of the work is not brought to a close for any cause, it devolves upon this court to retain jurisdiction until the issues are all settled. The court must see to the execution of its own decrees.

This question, beyond doubt, is inseparably connected with the decree of the court, whether the case be finally decided or not. That issue was directly presented in *Brown vs. Land Co.*, 49 Ann. 1779, and decided adversely to the position of the relator in the case now before us for decision.

Our learned brothers of the Court of Appeal have well said (Moore, Judge, the organ,) in their opinion in this case, that "it is a well settled principal of law, which needs the citation of no authorities to affirm it, that when jurisdiction once attaches to a cause, it is maintained to the end and to every branch and incident of the litigation of whatever nature they may be, and it is Code law, that, primarily, the inferior, and by appeal, the appellate court, shall determine the manner of the execution of the judgments which they have rendered, when the proper manner of executing them is to be determined." Citing C. P. 617-629.

"The ascertainment of the amount of costs incurred in a cause, and the taxation thereof against the party cast, is but an incident of the suit which, necessarily, falls within the authority of the court having jurisdiction of the case in which such proceedings are instituted."

Citing *Shraeder vs. Boyce*, 86 N. W. 388; *Iron Works Co. vs. Rouss*, 40 Ann. 121; *Factors and Traders Ins. Co. vs. The New Harbor Protection Co.*, 42 Ann. 583.

In *State vs. Judge*, 4th Rob. 85, it was held that this court never had jurisdiction, for no appeal had been taken on the main demand. In *Succession of Dougart*, 42 Ann. 516, the court found that the plaintiff did not seek to have the original judgment construed and interpreted.

Reasoning from the premise that the proceedings were divided and separate from the main issue, the court arrived at the conclusion that it had no jurisdiction.

This court recently said in a case in which the amount was even below the jurisdiction of the District Court: "True the District Court had jurisdiction because that court *ex necessitate rei* could see to the execution of its own judgment and the proper distribution of the funds in the sheriff's hands, but that the Court of Appeal, which had never exercised jurisdiction in the case in which the judgment had been rendered, had no jurisdiction, as it was not called upon to interpret a judgment which it had rendered." *State vs. Judges*, 106 La. 242. The court having jurisdiction of the controversy retains jurisdiction as to costs. *Encyclopedia of Pleading and Practice*, Vol. 5, p. 118.

We reaffirm that appellate courts have jurisdiction on appeal in matter of costs, such as depend on the event of a suit, which are to be paid after its termination.

The order *nisi* is recalled and annulled, and the application of relator for a *mandamus* is dismissed.

N. 14,280.

STATE OF LOUISIANA VS. DELGADO & CO.

SYLLABUS.

When the State Tax Collector proceeds to enforce the payment of additional licenses, for past years, exceptions and defenses to the effect that the licenses have been paid upon the basis of sworn statements, made by the party proceeded against and accepted by the then tax collector, and that such collector, or his successor, is without authority so to proceed, and is estopped; that the law providing for the collection of such licenses has

107	72
109	755
107	72
111	118

State vs. Delgado & Co.

been repealed; and that the law under which the proceeding is conducted confers no authority therefor; that the collector has failed to proceed promptly, with his collections, to keep a license register, and to furnish a list of delinquents; and that he has no right to demand penalties, present questions which affect not the constitutionality or legality of the tax, but the remedy of the State and the alleged omissions, errors and unauthorized proceedings of her officers in the matter of enforcing payment of such tax, and, hence, confer no jurisdiction on this court.

CERTIFIED from the court of appeal, parish of Orleans, by the Judges thereof applying for instructions.

Hugh C. Caye, for State Tax Collector, Plaintiff, Appellee.

Clegg & Quintero, for Delgado & Co., Defendants, Appellants.

The opinion of the court was delivered by

MONROE, J. The judges of the court of appeal for the parish of Orleans propound the question: "Has the appellate court, save and except the supreme court, alone, jurisdiction in the cause?"

The statement which precedes the question includes the exceptions and answer of the defendants to a rule to show cause, taken on behalf of the State, but does not furnish us with the rule, itself, from which omission there arises some uncertainty as to the precise legal propositions involved. Interpreting the application as best we can, under these circumstances, we understand the "cause" referred to in the question to be as follows:

The State Tax Collector rules Delgado & Co. to show cause why they should not pay an additional license tax of \$350, as wholesale sugar merchants, for each of the years 1897, 1898, 1899 and 1900. The defendants have already, in due season, paid state licenses for each of said years in the amounts for which, under their construction of the law, they considered themselves liable, and they resist the present demand on the grounds, that they owe nothing more, and that the State has no right to exact the additional tax claimed. The exceptions and answer filed on behalf of the defendants, which the applicants make part of their statement, seem to assume that the collector is proceeding exclusively under the authority of Act 171 of 1898, and is claiming additional licenses imposed by that statute not only for the years following its enactment, but for the years 1897 and 1898, the licenses for which had been fixed and collected, in whole or in part,

under pre-existing law. From the explanations, or argument, which also accompanies the statement, we, however, conclude that the applicants consider that the State predicates its right to demand additional licenses for the years last above mentioned upon the law, previously enacted, whereby the amounts of such licenses were fixed in advance, and upon the proposition that the defendants have only paid *in part* the amounts so fixed and are indebted to the State for the balances. In the absence of the rule taken on its behalf we assume this to be the state's position, and will proceed to consider that of the defendants with a view of furnishing an answer to the question propounded; bearing in mind, in so doing, that, as the *amount in dispute* is insufficient to give jurisdiction to this court such jurisdiction must attach, if at all, upon the ground that there is involved the question of the constitutionality or legality of a tax.

The propositions presented by the exceptions and answer, filed on behalf of the defendants to the rule taken against them, are, substantially, as follows, to-wit:

1. The defendants say that they made sworn returns for license purposes for the years 1897 and 1898 as required by Act 150 of 1890; that the, then, collector was satisfied with the same and issued a receipt showing the payment of their licenses for those years; that the present collector and his attorney are without authority to make any demand upon defendants with respect to said licenses for the reason that their authority, if any they have, is derived from Act 171 of 1898, which levies licenses for the year 1899 and subsequent years, and took effect only upon January 1st, 1899; and that said collector has no right, now, to be, "not satisfied" with the sworn statements made by them for the years 1897 and 1898, which were satisfactory to the, then, collector, and has no right to proceed against them under Act 171 of 1898 with respect to any licenses "due by respondents for the years 1897 and 1898."

2. That Act No. 150 of 1890 has been repealed and is now without force or effect.

3. That, for the years 1899 and 1900, respondents made sworn statements for license purposes, as required by law, and that the collector was satisfied therewith and issued receipts showing payments by respondents of their licenses for those years, and that the present collector is without authority to express dissatisfaction with said statements or to institute any proceedings with respect to said licenses.

4. That during the years 1897, 1898, 1899 and 1900, John Brewster,

the, then, tax collector of the district in which respondents conduct their business, expressed no dissatisfaction with the sworn statements made by them and did not traverse the same by rule or intimate that he so intended, and that John Brewster, now tax collector for said district is, without authority to ascertain the amount of the license due by respondents for said years, or to be "not satisfied" with the sworn statements which were accepted and acted on by the officer to whom they were delivered, and that said John Brewster, plaintiff in rule, is estopped to make the present demand.

5. That Acts 150, of 1890, and 171, of 1898, require tax collectors to collect licenses as rapidly as possible, and to keep a license register, and to furnish a list of delinquents, which requirements have not been complied with, and that the present proceeding is not authorized by said acts.

6. That respondents are not, and have never been, delinquents for licenses, but have paid what was demanded of them and what was ascertained to be due, and that the plaintiff is without authority to demand any penalties for non-payment.

7. That, in the event of their exceptions being overruled, respondents further show that they have paid all licenses due by them for the several years mentioned in said rule.

A careful examination of these grounds of exception and defense fails to disclose that they raise any question as to the constitutionality or legality of the tax claimed. The license taxes for the years 1897 and 1898 were imposed under the authority of Act No. 150, of 1890, and those for the years 1899 and 1900 under the authority of Act 171, of 1898. The respondents do not question the constitutionality of either of those statutes; they do not deny their liability for the licenses upon the bases established by them; nor do we find any issue presented upon the subject of those bases. The defendants made their sworn statements with a view of conveying certain information to the collector, upon the faith of which he received payment of their licenses. If, instead of so doing, the collector had, then, said "these statements are incorrect and I shall traverse them, by a proceeding in court," the only question presented would have been; "are the statements true or untrue, do they give the defendants' gross annual receipts correctly, or do they not?" And that question, whether presented then, or now, suggests no doubt as to, but, in its nature, admits, the constitutionality and legality of the tax, the amount of which, alone, is thereby made

the subject of inquiry. Equally is this true of the proposition that the sworn statements made by the defendants, having been accepted by the collector, cannot now be questioned by him or by his successor. Those statements, of themselves, in effect, admitted the taxes, for the purposes of which they were made, to be constitutional and legal, and, whether, the collector could, then, or can, now, dispute their correctness, as to the facts recited, in no manner affects that question. If it be true that Act No. 150, of 1890, has been repealed, and that there is now no law under which licenses imposed by that statute, and still unpaid, can be collected, it might result that the State has cut herself off, by depriving herself of all remedy, from the collection of a portion of her taxes, but it does not follow that the taxes of which she is thus deprived are either unconstitutional or illegal. Nor, if it be true that the collector is endeavoring to enforce the payment of the particular taxes in question under a statute from which he derives no authority, does it follow that such taxes are, or ever were, affected with unconstitutionality or illegality. And so, with regard to the collector's alleged failure to proceed promptly, to keep a register, to furnish delinquent lists, and his right to exact penalties. These, like the others, are questions which relate, not to the constitutionality, or legality, of the taxes, but to the remedy of the State and to the alleged omissions, errors and unauthorized proceedings of her officers, in the matter of enforcing payment of taxes, the constitutionality and legality of which are not in dispute.

It is "well settled that questions involving the legality of assessments and of over, and under, assessments and of the mode of levying and collecting the tax do not affect the legality or constitutionality of the tax itself, and, hence, that this court is not vested with jurisdiction, by reason of the fact that such questions are involved."

Koch vs. Triche, Sheriff, etc., 52 Ann. 833 (and authorities there cited).

See, also, State vs. King, & Putnam, 106 La. 88.

It may be remarked that the learned judges by whom this application is made seem to have labored under some misapprehension as to what was decided in the case of Koch vs. Triche (*supra*) since, after quoting at some length from the original opinion, they say: "The motion to dismiss was denied," whereas a rehearing was granted and the appeal was dismissed. See case, as reported, 52 Ann. 834.

Our answer to the question propounded is "Yes."

BLANCHARD, J., dissents.

No. 14,116.

J. T. CANTER VS. HEIRS OF PETER WILLIAMS.

SYLLABUS.

1. Article 233 of the Constitution of 1898 declares that no sale of property for taxes made prior to the adoption of the Constitution shall be set aside for any cause, except on proof of dual assessment, or the antecedent payment of taxes, unless the proceeding to annul is instituted within three years from the adoption of the Constitution.
2. That provision of the Constitution was intended to have the effect of a statute of repose.
3. After the lapse of the three years from the adoption of the Constitution, the party in possession under his tax title, which has been duly recorded, cannot be disturbed except for the two causes mentioned.
4. Certainly, the claimant owner out of possession cannot be heard to urge other causes for setting aside the adverse tax title, or preventing its confirmation.

A PPEAL from the Fifteenth Judicial District, Parish of Calcasieu
—Williams, J. *ad hoc*.

Cline & Cline, for Plaintiff, Appellee.

M. Dracos Dimitry, Sompayrac & Toomer and James J. McLoughlin, for Defendants, Appellants.

The opinion of the court was delivered by

BLANCHARD, J. Peter Williams acquired under the "homestead" Act of Congress, the southeast quarter of Section 18, Township 10 south, Range 12 west, situated in the Parish of Calcasieu.

Patent therefor issued to him on September 10, 1880.

He failed to pay taxes assessed thereon for the year 1882, and the property was sold in satisfaction thereof in May 1883, and bought by S. A. Fairchild, to whom the Tax Collector made formal title, which was placed of record in Calcasieu Parish on June 4, 1883.

Leon & H. Blum recovered a judgment against Fairchild, and in execution thereof the sheriff seized the land in question as the property of Fairchild, and, after due proceedings had, adjudicated the same in December 1893 to the Leon & H. Blum Land Company.

Subsequently, to-wit: in September 1896, the Leon & H. Blum Land

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109 83
100 651
106 740

107 77
114 289

107 77
1151076
116 448
117 358

107 77
118 93

107 77
1124 414
125 667

Company conveyed the land, with other lands, to W. L. Fairchild, and the latter, in March 1898, conveyed the same to M. Marx and Aaron Blum.

Marx and Blum, in turn, conveyed the land in April 1901 to the plaintiff herein, J. T. Canter.

These several acts of sale appear to have been duly and seasonably registered in the conveyance records of the Parish of Calcasieu, and, it would seem, the possession of the land accompanied the acts of transfer.

In June following his acquisition of the title, Canter brought the present action to confirm the tax title, to which the chain of title, under which he holds, traces back.

It is brought under the authority of the second paragraph of the Art. 233 of the Constitution of 1898 and Section 3 of Act 101 of the Acts of 1898—which act was designated to carry into effect the Article of the Constitution.

Defendants are the sole heirs of Peter Williams, who had acquired the land under the homestead law. Peter Williams, it seems, left the Parish of Calcasieu, removed to the City of New Orleans, became a resident there, died there, his succession was opened there and his heirs were recognized and sent into possession of his estate by judgment of the District Court there, rendered in 1897.

This judgment sending into possession, specifies the property constituting the estate, with reference to which it (the judgment) was to be operative, and the land in question in this suit is not mentioned or referred to.

From 1883 to the time of the institution of the suit, therefore, it would seem that neither Peter Williams, nor his heirs, have laid claim to the land, nor paid taxes thereon.

Art. 233 of the Constitution declares that no sale of property for taxes, *made prior to the adoption of that instrument*, shall be set aside for any cause, except on proof of dual assessment, or of payment of taxes for which the property was sold prior to the date of sale, unless the proceeding to annul is instituted within three years from the adoption of the Constitution.

Among the defenses set up is not found that of dual assessment of the property, nor that of payment of taxes, for which the property was sold, prior to the date of sale.

As to other causes or grounds existent for setting aside the tax title,

Frele vs. Luben, his Wife.

we do not find that any proceeding to annul was instituted within three years of the adoption of the Constitution.

Viewing the various defenses set up herein, in bar of plaintiff's demand for the confirmation of the tax title under which he claims, as a "proceeding to annul," they cannot be entertained for they are asserted too late. This suit was filed more than three years after the adoption of the Constitution. As against them, the peremption or prescription of the Constitution is invoked.

That provision of the Constitution was intended to have the effect of a statute of repose. After the lapse of the three years from the adoption of the Constitution the party in possession under his tax title, duly recorded, cannot be disturbed except for the two causes mentioned in Art. 233—that of dual assessment and that of antecedent payment of taxes. Certainly, the claimant owner out of possession, as here, cannot be heard to urge other causes for setting aside the adverse tax title, or preventing its confirmation.

Judgment affirmed.

Rehearing refused.

No. 14,124.

HENRY FRELE VS. JOHANNA LUBEN, HIS WIFE.

SYLLABUS.

Where judgment has been rendered in the District Court in a suit for separation from bed and board, from which no appeal has been taken, a separate appeal will not lie to the Supreme Court from the decree of the District Court which taxes costs simply by reason of the character of that suit.

A PPEAL from the Civil District Court, Parish of Orleans.—*Sommerville, J.*

Cooper & Walshe, for Defendant, Plaintiff, in rule, Appellee.

Albert Voorhies and *John G. Robin*, for Plaintiff, Defendant, in rule, Appellant.

107	79
114	861
107	79
117	820
107	79
119	390
107	79
124	900

STATEMENT OF THE CASE.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant and appellee moves for the dismissal of this appeal on the ground, first: That the Supreme Court is without jurisdiction *ratione materiae*, the amount involved being less than two thousand dollars; second: that the appeal herein taken is not from a final judgment, but solely from an interlocutory decree, which cannot be made the subject of a detached, special and separate appeal.

The plaintiff sued his wife for a separation from bed and board. She answered, setting up, additionally, a reconventional demand. The District Judge, on May 1st, 1901, rendered judgment dismissing plaintiff's demand at his, and defendant's reconventional demand, at her costs.

In June, on suggestion of the defendant to the court that the judgment had become final and executory; that she had incurred costs in the defense of the suit to an amount of one hundred and one dollars and fifty cents, and that other costs would be incurred by her, plaintiff was ruled to show cause why the said amount of costs should not be taxed against him.

The court, after hearing evidence, made the rule absolute, and, accordingly, adjudged and decreed that the items of one hundred and one dollars and fifty cents be taxed as costs against the defendant in rule. He obtained a suspensive appeal from this decree, and it is this appeal which is asked to be dismissed.

Both parties agree that the judgment in the suit for separation from bed and board is final.

Appellant urges, in support of the appeal, Article 85 of the Constitution of 1898, claiming that under that article the Supreme Court has exclusive jurisdiction over all suits for divorce and separation from bed and board, and over all matters arising therein.

He contends that the rule to tax costs is an incident of the original suit and inseparably connected with it, and that the Court of Appeals is without jurisdiction to regulate and enforce judgments in divorce or separation suits; also that the decree, though interlocutory, is appealable, as it works irreparable injury. C. P. 566.

He refers the court to *Iron Works vs. Rouss*, 40th Ann., 121; to *State ex rel. Cunningham vs. Lazarus*, 40th Ann., 856; to *Succession of Dougart*, 42nd Ann., 517, and *Delesdernier vs. Delesdernier*, 45th Ann.,

1364. The appellee refers to the same cases, and adds to these Succession of Bly, 47th Ann., 219; Durward vs. Williams, 46th Ann., 708, and Learned vs. Walton, 42nd Ann., 453; Succession of Bogart, 42nd Ann., 516; State *ex rel.* Elder vs. Judge, 30th Ann., 229; Murphy vs. Murphy, 45th Ann., 1482, and Drew vs. His Creditors, 49th Ann., 1841.

She maintains that no appeal will lie from an interlocutory decree which has become final, or from which no suspensive appeal has been taken.

OPINION.

This appeal must be dismissed. There can be no question as to the appellate jurisdiction of the Supreme Court in "suits" for divorce and separation from bed and board, and over all matters arising "therein," for Article 85 of the Constitution of 1898 is express to that effect; but this grant of jurisdiction does not destroy the rules and regulations and practice as to how and when that jurisdiction shall be exercised. The parties to the suit of Frele vs. Luben had the right to appeal from the final judgment therein suspensively or devolutively, as they might elect. Had either of such appeals been taken, the question of the costs therein would be before us on the appeal as costs, whether taxed simultaneously with the rendition of the judgment or later, constituted part of the judgment. (86 MV. 388.) Neither of the parties to the suit have thought proper to appeal from the judgment therein. The "suit" is no longer in existence.

The District Court has jurisdiction over the judgment therein now as it had always had. It is for the court, whether appellate or inferior, which rendered the judgment, to take cognizance of the manner of its execution, when the proper manner of executing it is to be determined. C. P. 629.

This court has never had the final judgment in the suit brought before it, and we are of the opinion that the matter of costs cannot be detached from the judgment, of which it forms part, to be made the subject of a separate "appeal" to this court simply by reason of the character of the suit in which they were incurred. As matters arise in different suits for divorce and separation from bed and board in respect to which relief from us is asked, we will dispose of the

same under their special facts and circumstances. Succession of Bly, 47th Ann., 220; Delesdernier vs. Delesdernier, 55th Ann., 1364.

For the reasons assigned, the appeal is dismissed.

Rehearing refused.

BLANCHARD, J., dissents, holding that this court having appellate jurisdiction under the Constitution of suits for separation from bed and board and of all matters "arising therein," an appeal on a rule to tax costs can come only to this court.

BREAUX, J., concurs in the above dissent.

No. 14,013.

SUCCESSION OF EDWIN M. BURKE.

SYLLABUS.

1. A wife, or widow, claiming as her separate estate property purchased during the community, must prove, first, the *paraphernal* character of the funds used in the purchase; second, her *separate administration* of those funds; third, *their investment* in the property in question.
2. When, during marriage, a wife buys property with her separate, paraphernal, funds, intending the purchase to be an investment of such funds, it is not essential that the act of purchase should recite the fact that she is buying with her separate funds under her own administration and for her sole account, and not that of the community, though it is advisable always that such declaration be made in the deed.
3. But when *the husband*, during marriage, buys property in his name, intending it as an investment of his separate funds, to be held for his individual account and not that of the community, it is essential that some indication of this intention, and of the character of the funds used, be given in the act of purchase.
4. Improvements put, during marriage, upon the wife's separate landed property at the expense of the community, may be claimed by the wife at the dissolution of the community, but she owes the community their value.

A PPEAL from the Fifteenth Judicial District, Parish of Calcasieu
—McCoy, J. *ad hoc*.

Schwing & Moore, for Executrix *et als.*, Appellees.

Cline & Cline, for Opponents, Appellants.

Succession of Burke.

The opinion of the court was delivered by

BLANCHARD, J. This contest is over the final account filed by the executrix, Mrs. Rose O. Burke. Oppositions were filed by three creditors, to-wit:—the Citizens' Bank of Jennings, J. H. Hoffman and Mrs. M. Valdetero.

One of the contentions is that certain real estate in the town of Jennings, described in the pleadings, standing in the name of Rose O. Burke, belonged to the community, and was not the separate property of Mrs. Burke. Opponents ask that the executrix be decreed to account for the same.

The conclusion of the District Judge was that the evidence sustained the claim of Mrs. Burke to this real estate as her separate, paraphernal property.

We are not prepared to say he erred. The rule is that a wife, or widow, claiming as her separate estate property purchased during the community, must prove, first, the *paraphernal* character of the funds used in the purchase; second, her *separate administration* of those funds; third, *their investment* in the property in question. *Stauffer, Macready & Co. vs. Morgan*, 39 La. Ann. 632.

Mrs. Burke has satisfactorily met these requirements of the law.

When, during marriage, a wife buys property with her separate, paraphernal funds, intending the purchase to be an investment of such funds, it is not essential that the act of purchase should recite the fact that she is buying with her separate funds under her own administration, and for her sole account, and not that of the community, though it is advisable always that such declaration be made in the deed. *Metcalf vs. Clark*, 8 La. Ann. 286.

It suffices to put creditors and others on guard that the title is taken in her name, and, when put to the test, if she proves *de hors* the act that the funds used were her separate funds, the source whence derived, that the same were under her separate administration, and were used in the purchase as an investment for her separate account, her title will be maintained.

The presumption of law, however, is that property bought during marriage in the name of either spouse falls into the community. This is elementary.

But when *the husband*, during marriage, buys property in his name intending it as an investment of his separate funds, to be held for his individual account, and not that of the community, it is essential that

some indication of this intention, and of the character of the funds used, be given in the act of purchase.

For the reasons of the law for the distinction made in this regard, between purchases in the name of the wife and those in the name of the husband, see *Hero vs. Black*, 44 La. Ann. 1036.

After Mrs. Burke's purchase certain improvements were put upon the property. These were paid for by the husband. Their value at the time of the death of the husband, or an amount equal to the enhanced value of the lots by reason of their improvement constituted an asset of his estate, or rather of the community, and must be accounted for by Mrs. Burke, in her reckoning as executrix.

The District Judge fixed the value, under the evidence, at \$1350.00. His action in this regard is sustained.

So also is his action holding that the price of a certain carriage sold by the executrix (being one of the items in dispute) should be accounted for as community funds.

We do not find that opponents' contention in regard to six small promissory notes, made by various persons, payable to order of E. M. Burke and by him endorsed, asserted as valid claims against his succession by one of opponents, is sustained. The defenses against these notes, maintained by the District Judge, are found to be sound.

The demand of opponents to have the costs incurred in a certain suit, brought by the Citizens' Bank of Jennings against the executrix, transferred from the rank of an ordinary debt to that of a privileged debt, claiming that the same should be classed under the head of "law charges," is not found to have merit. In that suit the bank recovered an ordinary judgment. The costs are part of this judgment—the whole entitled to be ranked on the schedule of debts only as an ordinary debt. These costs are not to be considered "law charges" in the sense that term is used in the several Articles of the Code referring to debts *privileged* in the settlement of estates.

It appears that the costs incurred in a suit by Narcissa York against the Succession were included among the law charges on the account of the executrix filed, and, because of this, opponent's demand that the costs in the suit in which they were interested should be treated likewise. But it does not appear that any one *opposed* the costs in the York case as having been erroneously included among the law charges. If opposition to this item of the account had been filed, we would have sustained it. As it is the item is not before us for consideration and action.

Succession of Burke.

The demand of opponents to disallow the claim of L. M. Valdetero, placed on the account for \$747.70 and interest at five per cent from date of approval, is found to be without merit.

The trial Judge considered the evidence sustained the claim and we agree with him.

The opposition was rightly sustained in regard to interest on the note due Mr. M. Valdetero. This note was for \$600.00 principal. It was placed on the account as an ordinary debt for the amount and for \$100.00 interest. It should have been for \$162.00 interest.

There was error in the judgment appealed from allowing the Citizens' Bank of Jennings ten per cent. as attorney's fees on a note for \$1000.00 and interest, approved by the executrix. The bank held, among other claims, this note for one thousand dollars, which was presented by the cashier of the bank to the executrix and by her approved to be paid in due course of administration. It was placed on the schedule in its proper classification. The contention of opponents is that inasmuch as the note stipulated for 10 per cent attorney's fees in the event it should become necessary at maturity to place the same in the hands of an attorney for collection, etc., the bank is entitled to this allowance.

We hold not. It does not appear that the note was ever sued upon, nor payment thereof demanded through an attorney. Had such been the case the allowance for the attorney's fees stipulated for would have been proper; without it, it was improper.

The account of the executrix classed the costs in the York suit, as we have seen, as "law charges", and this action was not opposed. The amount of costs was put down as \$86.40. It appears that the total of the costs in that case was \$215.80 instead of \$86.40, and the trial court increased the sum to \$215.80, and ordered the account amended so as to include said sum of \$215.80 among the "law charges."

There was error in this. This increase of costs should have been as an ordinary debt only. The \$86.40 was not properly classed as "law charges" and had it been opposed we should have so held. The difference between \$86.40 and \$215.80 is \$129.40. The evidence establishes the larger sum was due as costs and the error consisted in the rank given it as a "law charge."

There was an error in the account of the executrix in the matter of attorney's fees and costs in the suit of the Citizens' Bank against the Succession. The attorney's fees were put down at \$126.70 and the costs

Crichton vs. Press Company, Limited.

at \$268.80. It should be for attorney's fees \$268.80; for costs \$168.65.

It is ordered, adjudged and decreed that the judgment appealed from be amended so as to disallow the ten per cent. attorney's fees on the note for \$1000.00 and interest, approved by the executrix to be paid in due course of administration; that it be further amended so as to maintain at \$86.40, only, the costs in the York suit as "law charges," and the remainder of the costs due in that suit, to-wit:—\$129.40 be placed on the account as an ordinary debt; and that it be further amended in the matter of attorney's fees and costs in the suit of the Citizens' Bank of Jennings against the Succession, so as to make such item read for attorney's fees \$268.80; for costs \$128.65.

It is further ordered, etc., that in all other respects the judgment appealed from be affirmed, costs of this proceeding to be paid out of funds of the Succession.

No. 14,268.

THOMAS AND J. E. CRICHTON VS. WEBB PRESS COMPANY, LIMITED.

SYLLABUS.

An appeal is perfected by the filing of the appeal bond. From an order appointing of refusing to appoint a receiver under Act 159 of 1898, the appeal must be perfected before the expiration of ten days from the entering of such order appointing or refusing to appoint a receiver.

A PPEAL from the Second Judicial District, Parish of Webster.—
Watkins, J.

Wise & Herndon, for Plaintiffs, Appellants.

L. K. Watkins, for Defendant, Appellee.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiffs and appellants brought suit against the defendant, asking the appointment of a receiver under Act No. 159 of 1898.

Their demand was rejected and the appointment of a receiver was refused. The trial was had in open court.

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109 661

A written opinion was read in open court and filed in open court on December 4th, 1901.

On December the 14th, 1901, on motion of plaintiffs, an order was granted them in open court for an appeal, suspensive or devolutive, "returnable to the Supreme Court at New Orleans in ten days, according to law."

An appeal bond was signed and filed on December 18th.

On December 22nd, Messrs. Wise & Herndon, attorneys of plaintiff, filed a motion in this court praying that the return day for filing the transcript of appeal be extended to the 3rd of January, 1902. The applicants stated that they filed with the motion the affidavit of the clerk of the District Court, showing that he would require further time to complete the transcript of appeal.

The paper referred to was not an affidavit, but a certificate of the clerk of the District Court, under the seal of the court, dated December 21st, 1901, in which he certified to the fact of the rendering of the judgment in favor of the defendants, the fact that an order of appeal, suspensive and devolutive, had been applied for and granted on the 14th of December, returnable to the Supreme Court in New Orleans in ten days, according to law; that the transcript in the case was tedious and could not reasonably be made in the length of time allowed by the order of the District Court. The clerk asked that the time be extended at least ten days.

The court was not in session when the motion was presented, but it was received and ordered to be filed by the clerk here. The Supreme Court only met on the 6th of January, 1902. On the 30th of December, 1901, the defendants, through their counsel, applied to the Supreme Court for an order from it directing its clerk to issue a certificate showing abandonment of appeal, and applying in the alternative for a dismissal of the appeal.

On the 2nd day of January, 1902, the plaintiffs filed the transcript of appeal.

The court directed these various documents to be filed by its clerk as of date of receipt by him.

The grounds assigned by the defendants for having a certificate of abandonment issued, or the appeal dismissed, were that, under Act No. 159 of 1898, the appeal from a judgment appointing or refusing to appoint a receiver must be perfected in ten days from the signing of the order appointing or refusing to appoint a receiver; that there

was no timely motion made for the granting of an appeal; that the order of appeal granted on the 14th of December, was not timely; that the bond filed on the 18th of December was too late, as more than ten days had elapsed from the entry of the order and judgment refusing to appoint a receiver; that if the order of the judge in granting the appeal was timely, it could only carry out the statute and have the effect, as it implies, of making the appeal returnable "according to law" equivalent, as it were, to an order entered *nunc pro tunc*; that such an order could not have the effect of granting to the appellant twenty days in which to perfect the appeal, when the statute only gave ten days; that the application of the plaintiffs, filed in the Supreme Court on the 23rd of December, 1901, could have no legal effect and stand in the way of granting the certificate, for the reason that the appeal was not perfected, and the appeal bond in the lower court was not filed in time, and the application to have the return day extended was not filed in time and could not be considered by the court, and it was not made under oath and in due form.

The practice of this court has been to permit applications for extension of return days, made to the court when it was not in session, to be filed by the clerk on the day of their receipt, and to act thereon *nunc pro tunc* on the first judicial day of the court thereafter by an *ex parte* order, but granted "without prejudice."

Appellees having contested the right of the plaintiffs to have been granted an extension, and the right to be heard on appeal, we have examined the rights of both parties in the premises.

In view of the fact that at the time appellee applied to have this court direct its clerk to issue a certificate of abandonment of appeal, appellant had already prayed for an extension of the return day of appeal, it was deemed best not to act *ex parte*, but to decline the application and let matters be tested contradictorily on the motion to dismiss the appeal, and it was so ordered.

If, at the time the application for an extension of time was filed in the Supreme Court, plaintiffs had already lost their right of appeal, any order of ours granting the application would have to be set aside on opposition thereto as having been improvidently made. The first question is, therefore, whether at that time plaintiffs' right of appeal had lapsed. The appeal in this case was taken by plaintiffs who were demanding to have a receiver appointed to the defendant corporation from a judgment rejecting their demand.

The 4th section of Act No. 159 of 1898, a statute specially regulating the practice of appointing receivers of corporations under Articles 109 and 133 of the Constitution, gives to any party interested an appeal from the judgment of court which may be rendered on such an issue. The section declares that "such appeal must be taken and perfected within ten days from the entry of the order appointing or refusing to appoint a receiver. Such appeal shall be returnable in ten days from the date of such order and shall be tried by preference in the appellate court. Any interested party may apply within thirty days after the entry of the order of appointment of a receiver, to vacate same on legal or just grounds, and may appeal from an adverse judgment, but shall not suspend the functions of said receiver."

The short period granted for the taking and perfecting of such an appeal was, doubtless, intended to provide specially for the case of an appeal from an order "appointing" a receiver in view of the importance of a quick determination of the issue. The importance is not so great, perhaps, where the application has been refused, but be this as it may, the statute has made no distinction between the two cases. Under the terms of the statute the plaintiff was called upon to take and perfect his appeal within ten days from the date of the judgment. This means he must have obtained an order of appeal and furnished a bond under the order within the delay fixed. An appeal is perfected by the furnishing of a bond and not necessarily by the filing of the transcript in the case within that time. That time may be extended by the appellate court for good and sufficient reasons assigned. The District Court, in this case, when applied to, made the appeal returnable in ten days "according to law." The order did not state it was returnable in ten days from the order granting the appeal, but in ten days "according to law." Counsel of appellants construed the order to mean as if it read "returnable in ten days hereafter," and on that theory executed their bond on the 18th of December, while, in fact, the time limit for perfecting the appeal under the statute had expired. The effect of the order of appeal construed as appellants construed it, was to make the period for the perfection of the appeal twenty days instead of ten, as "the ten days according to law" were at the date of the order of appeal then expiring. The obvious belief of both the District Judge and appellants' counsel was that the judge was authorized to fix and extend the "return day" under Section 31 of the Revised Statutes.

Section 31 declared that "in all cases the judge of the court from

which an appeal is taken shall make the appeal returnable to the appellate court at the next return day for appeals from the parish, if there shall be time enough after granting, to give notice required by law and to prepare the record, if not then he shall fix this return day for the following term day."

Act No. 92 of 1900 enacted that "the judges of the District Courts throughout the State (the Parish of Orleans excepted) shall fix the return days in all civil cases appealable to the Supreme Court, provided that the judge shall fix the return day in the order granting the appeal which shall not be less than fifteen, nor more than sixty, days from the date of the orders, except by consent," and further enacted that all laws or parts of laws in conflict therewith were thereby repealed, and that the act take effect from and after its passage.

We are satisfied, from an examination of the transcript which has been filed, that it would have been difficult to have prepared it during a term of court in ten days, though nothing is said in the application for or in the order of appeal of the necessity of any extension on that account. There is no doubt that had the appellant executed a bond on the 14th of December, the day upon which he applied for and obtained an appeal, he would, thereby, have "perfected" his appeal, under the terms of the law, leaving open the transmission of the record as a separate and independent question for later consideration and action. He did not do so, evidently relying upon the right and power of the judge to fix the return day at ten days from the date of the order of appeal.

Appellee contends that Act No. 159 of 1898 is a special law providing for a particular class of cases, and is unaffected by Section 31 of the Revised Statutes of 1900, and they cite *State ex rel. Carig*, 104 La. 538, in support of this position.

We are very reluctant to dismiss appeals, but appellees have legal rights in this matter which we are not permitted to disregard. Appellees' position is correct and we are compelled to dismiss the appeal. Appellants should, on the rendering of a judgment against them, have applied, at once, for an appeal, and the court should have fixed the return day according to the terms of the law, leaving to them to apply to this court for an extension of time to file their transcript if they found it could not be completed in time for the return day.

The appeal is hereby dismissed.

No. 14,151.

J. GAB. DUPERIER VS. MRS. MATHILDE BERVARD, WIDOW OF DR. FRED.
DUPERIER.

SYLLABUS.

1. An heir who asks to be recognized as an heir and to be placed in possession of a succession, to the extent of his interest, has a right of action.
2. As to this heir, the will of the *de cuius* not having been legally probated, he may be heard to have all the proceedings leading to the judgment probating the will, as well as the judgment itself, decreed null.
3. The proceedings and judgment probating the will are null, and the judgment appealed from is affirmed.

A PPEAL from the Nineteenth Judicial District, Parish of Iberia.—
Foster, J.

Walter J. Burke & Bro., for Plaintiff, Appellee.

Todd & Davis, for Defendant, Appellant.

The opinion of the court was delivered by

BREAUX, J. This suit was brought to set aside the proceedings had in the matter of probating the will of the late Dr. Frederick Duperier who died in 1900, leaving eight children, one of the number being the petitioner to set aside the will. Plaintiff asks for judgment recognizing him as forced heir of his deceased father and as such, together with his brothers and sisters, vested with the seizin of the estate.

The legatee is the widow of the late Dr. F. Duperier. She petitioned the court for a judgment probating the will. In accordance with her petition, judgment was rendered, although plaintiff had not been legally cited. The return shows that Mrs. Duperier's petition to probate the will was never legally served on the petitioner here, but on another person without showing that the one upon whom it was served had authority to represent this heir. This service was neither personal nor domiciliary.

The judgment from which the legatee appeals states that the will was in the nuncupative form by public act, and decrees that the testatrix be placed in possession of all the property of the testator, and that she "have immediate seizin of said estate in full ownership and in fee simple."

Petitioner timely objected (to the admissibility of any proof that the will had been probated) on the ground that he had not been regularly cited.

Petitioner, appellee here, avers in substance that his mother is selling the property of the estate and disposing of it as her own, in violation of his rights as forced heir. Petitioner having asked to be recognized as forced heir is entitled to all the rights afforded by forced heirship.

Now that the issue is tendered, it is no longer possible to consider the legatee as universal legatee entitled to all the property, and it was proper to set aside a judgment which precluded this heir from asserting his right to the *legitime*, and particularly in view of the fact that it was not rendered contradictorily. We will here state that the will is only null to the extent that it disposes of property to the prejudice of the reserve of the heir.

Of course the forced heir will have seizin only to the extent of his interest and can exercise no control save to the extent of that interest. Further, we are anxious to state, on leaving the transcript, that the legacy to Mrs. Duperier is not stricken with nullity, but that it can be, if the heir insists, only reduced to the disposable portion.

We have to deal with the cold letter of the law which requires the will to be probated contradictorily with the heirs, and further that the forced heir is entitled to possession to the extent of his interest. This we understand is the purpose of the decree. We have no alternative, save to affirm it and let the case be returned in order that this heir and his mother may settle their respective interests.

We agree with the judge of the District Court, that the proceedings in matter of probating the will and the probate itself are null.

For these reasons the judgment appealed from is affirmed.

No. 13,879.

FRANK B. WILLIAMS VS. CHARLES L. TRICHE, SHERIFF AND TAX COLLECTOR.

SYLLABUS.

1. As long as the present legal ownership of trees standing upon the roots upon a plantation remain in the owner of the land, they must be assessed with the land and as forming part of it.

107	92
111	1024
107	92
120	845

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2. Where the owner of land makes a contract with another by which he conveys the latter rights in respect to the trees standing by the roots on the land, but rights which fall short of conveying present ownership thereto, assessors are not warranted in separating, for the purposes of assessment the trees from the land, and making the trees the object of direct taxation as corporeal movables, distinct from the land to which they are attached. They cannot bring about a severance in the present ownership of the trees, and the land which does not result legally from the contract. The liability of the party who makes such a contract with the land owner to taxation under his contract rights, would not be enforceable under an assessment made in his name upon the trees themselves.
3. Individuals may make agreements or dispositions as to taxation and as to the payment of taxes which may be binding as between themselves, but such agreements or dispositions cannot have effect as against the State, when, thereby, the parties themselves or the objects of taxation with which they deal are not brought within the grasp of the laws governing taxes and the enforcement of taxes. Assessors and tax collectors, in their action, cannot go outside the existing statutes.

A PPEAL from the Twenty-Seventh Judicial District, Parish of Assumption—*Leche, J.*

Beattie & Beattie, for Plaintiff, Appellant.

Walter Guion, Attorney General, and *A. A. Gondran*, District Attorney (*Lewis Guion*, of Counsel), for Defendant, Appellee.

The opinion of the Court was delivered by

NICHOLLS, C. J. The plaintiff alleged that by public notarial act, passed in the Parish of St. Mary, on the 26th day of October, 1899, before Wilbur H. Kramer, a notary public in the said parish, and a duly certified copy of which he annexed, petitioner purchased from the Leon Godchaux Co., Limited, the following rights:

The right to deaden cut and remove all cypress trees now standing upon the lands situated in the Parish of Assumption in this State, which he described.

That this right was to last only for ten years, and after that time the right was to revert to the conveyors.

That the said right was a mere personal right to cut the trees upon the said land, and is, if anything, a mere right or credit, having its domicile or place of being at the residence of and domicile of petitioner.

That the said trees were not the property of petitioner until cut and removed, and only in that way and in so far as he does so cut them

and to that extent, will they belong to the petitioner. That the property so acquired was not *in esse*, but it is in future to become such under certain terms and conditions and if property at all was a mere personal right or credit taxable at the domicile of petitioner and nowhere else. That the trees upon that land were mere fruits or crops and, under the law of the State, cannot be separately assessed or taxed from the land on which they are growing, they being in reality still in the possession of the said Leon Godchaux Co., Limited, as the owners of said land, and the right to cut only will give proprietorship and possession to petitioner at some future time and under conditions that may never occur and then only *au fur et au mesure* to the extent each year of his taking advantage of the contract made between himself and the said Leon Godchaux Co., Limited.

That the said lands are now assessed and taxed rightfully in the name of and to the said Leon Godchaux Co., Limited, and they do not, so far as petitioner was aware, contest the assessment nor the taxation thereof. That despite these facts Robert Martin, the assessor of the Parish of Assumption, and a resident of that parish, had assessed the said right of petitioner in the sum of or for a valuation of twenty-four thousand dollars for the taxes due the State and Parish Levee Boards thereon, and the sheriff, *ex officio* tax collector, threatened that in the event of the non-payment he would at once proceed to seize and sell whatever right petitioner may have, alleging that he would sell the trees themselves so that petitioner could not have the future use and enjoyment of his rights under the said contract above set out.

That the whole assessment and attempted levy of these taxes was illegal, null and void as not being on taxable property, and if on taxable property, not taxed at the proper legal domicile thereof. That should the said sheriff proceed to do as he threatens, he will work petitioner an irreparable damage.

The premises considered, petitioner prayed that the said Charles L. Triche, in his capacity as sheriff and tax collector of the Parish of Assumption, and the said Robert C. Martin, in his capacity as assessor of the Parish of Assumption, be cited to answer thereto, that after due proceedings the said taxes be decreed to be illegal and null, and that the said assessment be nullified and made of no avail, and that the sheriff of the parish be ordered and enjoined to cease from troubling petitioner, and that the said pretended assessment be erased from the rolls of assessment, and the assessor prohibited from again placing the

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same on the same rolls, and the sheriff and tax collector prohibiting from collecting the same.

Petitioner prayed for costs and all and general relief, etc.

The act referred to in plaintiff's petition declares that "the Leon Godchaux Company, Limited, sells and transfers to Frank B. Williams (the plaintiff) the right to deaden, cut and remove all the cypress trees then standing on the property described. The sale was made for and in consideration of the prior payment of forty thousand dollars, which the purchaser paid cash. The sale was made in further consideration of the obligations taken by Williams to construct a canal not less than thirty-five feet in width through the centre of the lands described, at his own expense. It was agreed that Williams should have the right to cut down and use all the wood needed for fuel which he might need to run his dredge-boat while digging the canal, and to run his pull-boat to pull the timber off the land; that Williams should remove one-half of the timber within five years and the balance within ten years; all the trees remaining on said lands after the expiration of ten years shall belong and revert to the Leon Godchaux Co., Limited. It was further agreed that Williams should have no right to grant, sell or convey to any party or corporation the privilege or right either to go through the described lands, to construct a wagon road or railroad, whether narrow gauge or standard gauge, nor to drain through said lands except with the written consent of the Godchaux Company, Limited, and that the latter company shall be responsible for taxes upon bare lands made subject to this contract.

The tax collector answered, pleading first the general issue. He then averred that the naked lands described in plaintiff's petition were legally assessable in the name of the Leon Godchaux Company, Limited, and the assessor, in the performance of his duty, had legally assessed all of the property rights of F. B. Williams on said land, in accordance with law and the contract between the parties.

The District Court rejected plaintiff's demand and he appealed. In his opinion in the case, the District Court used the following language: }

"The jurisprudence of the State, in my opinion, is settled that intangible or incorporeal rights can only be taxed at the domicile of the owner where the law fixes their *situs*, and that tangible movables are taxable in whatever place they may be situated. 41 Ann. 645, 49 Ann. 43, 1195.

"This being conceded, the issue herein is restricted to the question

whether under the annexed act of sale before Kramer, notary public, on October 26, 1899. Williams acquired the full ownership of the cypress trees standing on the lands described or simply a right to become the owner thereof *in futuro*.

"Under the common law of England similar questions have often arisen and it seems conceded that a sale of trees to be taken away immediately was not a sale of an interest in the land, but merely of so much timber, that where the trees were to be cut as soon as possible, and even assuming that they were not to be cut for a month the test would be whether the parties really looked to their deriving benefit from the land or merely intended that the land should be in the nature of a warehouse for the trees during that period. *Marshall vs. Green*, I. C. P., Div. 35, 40.

"In other words, the English courts hold that when the trees or crops produced on the land have already matured and can derive no further benefit from the soil but remained attached to the soil merely for the convenience of the parties they may be sold as chattels, that such a sale does not convey an interest in the land, but is a sale of goods, wares and merchandise.

"Mr. Justice Blackburn in discussing the subject, says: 'The true subject of inquiry in each case is, when do the parties intend that the property is to pass? If the things perish by inevitable accident before the severance, whom do they mean to bear the loss? for, generally, that is a good test whether they intend the property to pass or not, etc.' * * * See Benjamin on Sales, Chapter II.

"An application of these principles to the facts of this case would indicate that if on the 26 of October, 1899, the Godchaux Co. sold Williams the trees that were to grow on the lands described during the ten years following, these trees not yet being *in esse*, or not having yet matured, then the contract was an executory one and the sale was only of a right somewhat similar to a lease; but if, on the other hand, the trees had at the time of the sale already matured and the delay of ten years was granted merely for the convenience of the purchasers, the land being in the nature of a warehouse, then the sale of the trees was absolute and immediately conveyed title to Williams. I do not think there can be any doubt that the latter is the true condition of affairs existing when the sale was passed before Kramer.

"Applying the test suggested by Mr. Justice Blackburn, should all the cypress trees on the land described perish and be destroyed by inev-

itable accident before they are severed from the soil, whom do they mean to bear the loss? Suppose a forest fire or a tornado destroyed all these trees, would the loss be that of Williams or the Godchaux Company under the terms of the agreement? I am clearly of the opinion in the event of such a catastrophe, or in the event of some inevitable accident not attributable to the fault or negligence of the Godchaux Company, that the parties to the sale intend that the loss should be that of Williams.

"The above principles, laid down by the common law writers, it seems to me, apply equally whether the objects are *fructus industriales* or *fructus naturales*, that is whether the crops are the result of the industry of men or the natural growth from the soil.

"The French authorities quoted by the able counsel of plaintiff do not, in my opinion, sustain his position in the present controversy. While it is true that anything attached to the soil forms part of the realty and cannot be taxed separately from the soil, this is true only to the extent that the ownership of the thing attached to the soil is vested also in the proprietor of the soil. If the owner of the soil sees fit to dispose of the thing attached to it, giving at the same time to the vendee the right to sever and remove the thing, it becomes at once a movable, the owner of the soil destroys the tie which makes it part of the realty and the thing is no longer affected with the immobility which the land had attributed to it, and this even before its severance and at the very time the title is vested in some one else.

"This seems to me to be the opinion of Marcadé. Again, the citation of Dalloz, "*Codes Annotes*," under C. N. 2166, which discusses the conflict between the rights for the creditors of the owner of the soil and the vendees of trees still attached to that soil, in my opinion, only establishes the principle that after a seizure by a creditor having a mortgage anterior to the sale of the trees, the trees cannot be taken away by the vendee because they formed part of the realty at the birth of the mortgage, and as such they are affected by the creditor's mortgage and their severance or mobilization is in violation of the rights of the mortgagee.

"Tant qu'ils sont laissés debout les arbres faisant partie d'une coupe vendu par le propriétaire continuent de faire partie de l'immeuble en ce sens qu'ils peuvent être compris dans la saisie de cet immeuble pratiquée par les créanciers ayant une hypothèque antérieure à la vente.

"Baudry Lacantinière in his treatise on Civil Law, under Art. 531, Corresponding to Article 465 of our Code, says: 'Les fruits pendant

par branche et par racine sont immeubles en qualité d'accessoires du sol qui les nourrit. Ils cessent d'avoir ce caractère et deviennent par suite chose mobilières quand on les considère abstraction faite du fonds auquel ils sont attachés. C'est ce qui arrive dans ces trois cas suivants: 1. Au cas de saisie brandon; 2. A l'égard du fermier de ce fonds; 3. Enfin les fruits pendants sont regardés comme meubles en tant qu'ils sont vendus séparément du fonds.'

"Our Supreme Court has held this to be the law in this State. 31 Ann., 246. To my mind, the best evidence that it was the intention of Williams to buy and of the Godchaux Co., Limited, to sell, absolutely, the trees on the lands described in the act before Kramer, is the fact, 1st, that the parties themselves described the object of the sale to be the right "to deaden, cut and remove all cypress trees now standing," etc., not the trees hereafter to grow, but the trees already *in esse*, ready to be deadened and cut and removed; 2. That at the end of ten years all cypress trees remaining on said lands shall belong and revert to the Leon Godchaux Co., Ltd. If they now belong to the Godchaux Company, what is the purpose of this clause?

"Evidently, the parties intended that Williams should and did at once become the owner of all the cypress trees, and if he failed to remove them, in the time specified, then the ownership of the trees should again be vested in the Godchaux Co. And 3rd, That the said Leon Godchaux Co., Ltd., should be responsible for the bare lands made subject of this contract. The parties knew that this valuable cypress was subject to taxation, either as movables or as part of the realty to which they were attached, and if the Godchaux Co. was only to be liable for the taxes on the bare lands, who was, under this agreement, to pay taxes for the cypress? The answer is plain,—it became Williams' duty to do so.

"It is my opinion in this case that the contract between Williams and Godchaux was an absolute sale of all the cypress trees on the lands described, there being the thing sold, the price and the consent. C. C. 2439. The sale was in lump (C. C. 2459) and the delivery constructive. C. C. 2478.

"The price is clearly set forth in the act and the consent of the parties is not only deducible by inference from the general tenor of the contract, but by several specific stipulations as above set forth. The position that the trees are also assessed to the Godchaux Co., is, in my opinion, untenable, and one in which the plaintiff has no interest. The

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presumption is that the assessor having assessed the trees to Williams has only assessed the bare lands to the Godchaux Company, and under the view which I have taken of this case, if the trees were included in the Godchaux Company's assessment, the right to complain would only lie with the latter."

MOTION TO DISMISS.

Appellee moved to dismiss the appeal taken on the ground that in said case neither the constitutionality nor legality of any tax, toll or impost whatever, is raised or involved.

Appellees, after reciting the allegations of plaintiff's petition in their brief, declare, that it is evident that the sole ground of complaint urged by Plaintiff, is that his right to cut trees on the property of the Leon Godchaux Company, has been improperly assessed, that he does not claim that the rights which he acquired are entirely free from assessment and taxation, but that the trees, the right to cut which he acquired, should be assessed in their name and not in his, and that he should not be subject to assessment and taxation until he enforces the right which he acquired from them by reducing the trees to possession. That there is no complaint that the assessor, in placing the cypress trees on certain lands belonging to the Godchaux Company, acted without constitutional warrant because of the property being exempt, but because he should not have assessed his property as *trees* since they had not been severed from the soil which belonged to the Godchaux Company, and had never come into his possession, but that all that should have been assessed, was his right to cut such trees, and this at the domicile in St. Mary parish; that the whole matter in litigation was not the legality of the tax but the propriety or correctness of the assessment. In support of this position we are referred to *Stubbs vs. Maguire*, 32 Ann. 817; *Gillis vs. Clayton*, 33 Ann. 285; *State ex rel Rivet vs. Lazarus*, 36 Ann. 286; *Cobb vs. Maguire*, 36 Ann. 801; *State ex rel David vs. Judges*, 37 Ann. 898; *Adler vs. Board of Assessors*, 37 Ann. 501; *Minor vs. Budd*, 38 Ann. 99; and *State ex rel Kock vs. Triche*, 52 Ann. 883.

Appellant refers to some of the same cases also to *Bertel vs. Assessor*, 34 Ann. 575; *State vs. Judge*, 41 Ann. 541; *Meyer vs. Sheriff*, 41 Ann. 646; *Woolfolk vs. Foubere*, 15 Ann. 15; *Marin vs. Orleans*, and *Arrow vs. Weatherly*, 6 N. S. 347; *Sutton vs. Calhoun*, 14 Ann. 209.

He says he is not contesting the *quantum* of taxation, but that he

claims he ought to be assessed for nothing because the property is not assessable.

Plaintiff's prayer is *that the tax be decreed illegal and null*, and the assessment on the rolls be erased.

The State, as we understand, claims that plaintiff is liable to taxation upon trees on the Godchaux plantation, and the plaintiff denies that he is so liable. If, in fact, he is not so liable, the tax claimed is *quoad* him illegal. We think plaintiff's demands strike deeper than the mere assessment, it puts at issue the liability to any assessment at all on the trees. The question of the correctness of the assessment is a consequential one.

The appeal is maintained.

Appellant does not attempt to assign to the contract which he made with the Godchaux Company, a specific legal character; he pronounces it *sui generis*—an “innominate” contract.

He maintains, however, that by and through that contract he did not become *ipso facto* the owner of the trees referred to therein, and if not the owner of the trees themselves, then he is not liable to direct taxation on the trees themselves, however much the property right which he may have acquired through his contract may be taxable.

He contends that what he acquired through his contract was an incorporeal right which though vesting in him, a legal interest in respect to the trees, was not a right of present ownership in the trees themselves. That if the claim of the State be true, then he (Williams) by his purchase, became the owner of each separate individual cypress tree on the Godchaux Plantation, and any person having a judgment claim against him, be it large or small, could cause to be made a direct legal seizure of particular trees or any particular number of trees which the sheriff or constable might select and sell at judicial sale, but that really the only right which a creditor of his would be authorized to sell, under his contract, in execution of a judgment against him, would be the indivisible incorporeal right which he acquired from the Godchaux Company, carrying with it, if sold in execution on the part of the purchaser, the duty to make the canal and carry out the other executory obligations of the contract.

That the trees could not be sold or assigned to any one else, as by the terms of the contract no one but himself and his employees could enter upon the property.

That as between the State and the Godchaux Company, the former

could at any time, for the purpose of assessment of taxes and the enforcement of taxes, hold the trees to be part and parcel of the land, and should the Godchaux Company not pay the taxes on the land, the property, as a whole, could be sold by the State without remedy on his part. Plaintiff quotes the following extract from Pothier in his "Traité des Choses Partie," II Sec., p. 205:

"Lorsque quel qu'un a acheté des bois pour les couper, ou des fruits pendans par les racines, la créance qui résulte de ce contract, est une créance mobilière; car elle tend à faire avoir à l'acheteur, à lui faire acquérir ces bois et ces fruits, après, qu'il les aura coupés; lesquelles ne peuvent lui être acquis plus tôt, puisqu'il n' a pas acheté les fonds, dont ils font partie; et par conséquent sa créance tend à lui faire acquérir quelque chose de mobilière; car ces bois, ces fruits, deviennent meubles par la coupe qui en est faite. C'est donc une action ad mobile par conséquent une action mobilière."

Plaintiff contends that while he could employ as many employees of his own during the period of his contract and cut down and carry off during that period as many trees as he might be able to do, he would not be justified with the means at his command in making partial sub-assignments to others in order to extend operations during the period, in view of the reserved interest of the Godchaux Company to all trees which could not be cut down and taken down during the term of the contract by himself, and his own employees. That in view of the uncertainty as to how many trees would be cut during the contract and what particular trees would be cut, it was impossible that the title to any particular trees would pass *ipso facto* by the contract.

In passing upon the issues involved in this litigation, it must be borne in mind that we are not determining the property rights between Williams and the Godchaux Company, but interpreting the legal situation viewed from the standpoint of the enforcement of rights and remedies of the State, as fixed by her own law.

No matter what may be the contract between private individuals, the State is not bound thereby if not in exact accordance with its statutes, any more than are creditors of a succession concerned by any private arrangement made as between themselves by the heirs of the deceased. (C. C. 1432).

Assessors and tax collectors of the State must look alone to the law for guidance in the discharge of their duties. It controls the State's rights and remedies, and officials are not free to depart from the same,

by reason of private arrangements which alter its provisions. It is for the law-maker to modify the laws of taxation from year to year to conform to changing conditions, and until this modification be made matters must rest in abeyance, how much soever things themselves alter. It is unquestionably true that up to the present time the Legislature has not, in express terms, provided for the separate taxation of trees while standing attached to land, or provided for the enforcement of such taxes by separate sale of the trees. It has not done so for the reason that contracts having in view the severance of the ownership of trees so situated from the ownership of the land to which they are attached are contracts of a very recent date in Louisiana.

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We have recently held in the case of the Globe Realty Co. vs. Lockett, Sheriff, that where parties have, by a contract, clear, positive and unambiguous, severed the present ownership of the trees, though standing by the roots at the time of the contract, from the ownership of the land, at the time of the contract, the later can be given effect to by taxation upon the land and the trees separately and by enforcement separately. The matter is full of difficulty, in view of the constantly shifting character of the laws of taxation and of the great complications to the rights and remedies of private individuals which will flow from a system.

The language of the act between Williams and the Godchaux Company as to what was the object of the contract differs from that in the case of the Globe Lumber Co. vs. Lockett, Sheriff.

In that act the trees themselves were declared to be the direct object of the sale, and the contract one of immediate conveyance of ownership. In the case at bar the thing conveyed by the Godchaux Company was not declared to be "the trees," but "the right to" cut down and remove all cypress trees on certain described land within an assigned, fixed period (in which period the vendors seem to have had an interest of their own), for and in consideration of the price of forty thousand dollars, which was paid cash, and the further consideration on the part of Williams to construct a canal of certain dimensions over a certain designated portion of the Godchaux Plantation, the work to be started and ended by a given time. One of the stipulations of the contract was that the trees remaining on the plantation, at the end of the period fixed, were to revert to the owners of the land, and that the latter was to pay the taxes on the "naked land." What is the proper construction of this contract? Plaintiff does not pretend to

affix to it a particular designation or character, they call it an "innominate" contract. Does the contract convey a present ownership in all trees on the land, or is full ownership held in abeyance until the trees are cut down by the plaintiffs? The defendants contend that the trees, though immovable in fact so long as they are standing upon the roots, can be "mobilized" by "anticipation" for the purposes of sale.

There can be no question as to the right and power of the General Assembly to authorize such a mobilization should it elect so to do. In *Weil & Co. vs. Kent*, we said: "It is within the power of the General Assembly to make such classification of things into movables and immovables as it may think proper—to make them the one or the other at different times, to fix and determine the rights and obligations of parties touching them in view of their shifting from one classification to the other, provided this should be done under circumstances such as not to impair the obligation of contracts. Parties taking rights after the Legislature should have acted upon the subject, have to do so with reference to existing laws. In the case cited, we held that the Legislature had provided for the special case of the furnishing of supplies for cultivating a growing crop, that the crop should be considered *quoad* the privilege securing the payment of the debt due for the supplies as a movable, but the question remains, has the law-making power exercised its rights in this respect as to "sales" of standing trees and the taxation thereon.

Our law considers a contract of sale perfect between the parties and the property of right acquired by the purchaser with regard to the seller as soon as there exists an agreement, though the object has not yet been delivered nor the price paid; (C. C. 2456); but it declares that with respect to immovable effects, although by the rule referred, the consent to transfer vests the ownership of the property in the obligee, yet this effect is strictly confined to the parties until the actual delivery. If the vendor, being in possession, should, by a second contract, transfer the ownership of the property to another person who gets the possession before the first obligee, the last transferee is considered as the owner, provided the contract be made on his part *bona fide*, and without notice of the former contract. In like manner, if movable property has been alienated by contract, but not delivered, it is liable, in the hands of the obligor, to seizure and attachment in the hands of his creditors."

Have the trees referred to in the contract between Williams and the Godchaux Company been delivered yet, and can they be delivered,

under the law, as it stands, until they have been cut down, and if they have not, are they not to be considered as to all the parties other than themselves as still unsold, and liable to be seized and sold as part of the plantation? If these trees were sold, was it contemplated by the parties that the legal title thereto should pass at once to Williams, and before he had performed the executory obligations of the contract? The obligation to construct a canal on the Godchaux Plantation was, under the language used, not a collateral obligation of the contract, but part of the direct consideration for the same. Something remained for the plaintiff to do before he acquired full ownership of all the trees. There is force in the contention of the plaintiff which goes to disprove a present absolute ownership in the trees.

Suppose that at the end of a year or two Williams, by stress of financial difficulties, should go or be forced into bankruptcy, with the trees uncut and the canal not dug, could he surrender the trees as corporeal movables belonging to himself separately and distinct from his contract obligations? Could his syndic sell the trees as corporeal movables separately and distinct from Williams' contract obligations? We think not. All he could surrender and all his syndic could sell would be his rights, coupled with his obligations under the contract.

However, the contract may be classified, we do not think the contract is one of an absolute present sale, with conveyance of legal title to the trees.

Under our law, the contract is not a dismemberment of the ownership of the land. Plaintiffs acquired no interest in the land through it. It will not do to say that the plaintiff "became substantially" the owner of the property. Until the title actually shifts, the owner of the legal title for the purposes of taxation remains *quoad* the State, the actual owner. It is in his name that the property must be taxed, and it is to him that all notices must be sent. As a matter of course, contract rights and obligations exist and may be enforced between the owner of the legal title and third parties inside of the legal title, if that expression can be used, but until the title actually shifts the State has nothing to do with them, unless she so expressly declares herself willing to do by statute.

The clause in the contract between the plaintiff and the Godchaux Company has been given, we think, by the district court, a broader and more extended effect than it called for. As between themselves the parties assumed the payment by each of a certain proportion of the

taxes for which *quoad* the State, Godchaux & Company, were primarily responsible for the whole. (Miller vs. Michoud, XI Rob., 332).

The usufructuary as between himself and the owner of the land has to pay the taxes, but the State deals with the owner of the land, and the property is assessed in his name.

It frequently happens that a person primarily held for a debt, may make arrangements between himself and some third person that the latter should himself pay the whole debt or a certain proportion of it, but this is a mere personal obligation, enforceable by a personal action between the parties. State assessors and State tax collectors are not authorized on behalf of the State to modify or novate the original rights of the State, and accept this personal obligation and severance, unless authorized so to do by statute.

Neither the assessors, the tax collectors, nor the courts have the right to decide for the State that it is to her interest that this should be done. It is for the Legislature to decide that matter.

Stress is laid by the District Court upon the expressions used in the act between the plaintiff and the Godchaux Company, that all cypress trees remaining upon the land, after the expiration of ten years, shall belong and "revert" to the Godchaux Company, Limited.

It is said that the trees could not revert to the latter unless the ownership of the trees had not prior to that time passed out from that company. In construing a contract, we should not seize upon particular words used 'n it in order to fix the rights and obligations of parties, but look to the entire act. We have so held repeatedly. *Tete vs. Lanaux*, 45 Ann, 1346, and authorities.

The language may well have been intended by the parties to restrain the generality of the expressions used in the first part of the contract when referring to the things covered by it.

In the first part of the act the right granted by the Godchaux Company, was "the right to cut *all* the cypress trees now (then) standing" on the property, while the closing part of the act restricts the right to such trees as they could and would cut within a certain time.

The District Court seems to have reached its conclusions that the contract evidenced an absolute present sale of all the cypress trees on the land principally for the reason stated that, were the trees or part of them to be destroyed the loss of the same would fall upon Williams, and their loss falling upon Williams, he must have been "their owner."

The loss of the trees might fall upon Williams and yet not be a loss resulting to him in right of "the ownership of the trees, but of his right "to ownership of the right to deaden, cut and remove," which he acquired by purchase. Under our law (Article 2449, C. C.), not only corporeal objects, such as movables and immovables, live stock and produce, may be sold, but also incorporeal things, such as a debt, an inheritance, a servitude or any other rights.

We are not prepared to say, under the terms of plaintiff's contract with the Godchaux Company, that the latter were left by the contract without any interest in the trees.

But whatever may be the rights and obligations of the parties themselves, which may be worked out under that contract, we are of the opinion that it left the legal title of the trees in the owners of the land upon which they were standing, and that is the pivotal fact in this case. We are of the opinion that plaintiff's claim, that he is not liable to taxation on said trees themselves by reason of his contract with the Leon Godchaux Company, referred to in the pleadings, and his demand that the said tax advanced against him by reason of the same, and the assessment of the said tax in his name, be decreed illegal, null and void, are just and well founded.

For the reasons assigned, it is ordered, adjudged and decreed that the judgment of the District Court be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the tax claimed against the plaintiff, as owner of the cypress trees themselves, which are referred to in the contract made on the 26th day of October, 1899, by act before Wilbur H. Kramer, notary public, between the plaintiff herein and the Leon Godchaux Company, Limited, be and the same is decreed null, void and of no effect, and the assessment as made upon such trees is ordered erased from the records with full reservation to the officers of the State to enforce plaintiff's liability to taxation under his contract aforesaid in a legal manner.

Blanchard, J., dissents.

Provosty, J., takes no part, not having heard the argument.

Rehearing refused.

Watkins vs. Land and Timber Company, Limited.

No. 14,091.

**J. B. WATKINS VS. NORTH AMERICAN LAND AND TIMBER COMPANY,
LIMITED.****SYLLABUS.**

1. Courts are very reluctant to interfere with the control of the affairs of a private corporation at the instance of a stockholder, or of a minority of the stockholders; but it is their right and their duty so to interfere in a proper case; and a proper case is shown where there is gross mismanagement of the business of the corporation, such as would, under the laws of the particular State in which the corporation is doing business, furnish grounds for the appointment of a receiver; or such as amounts to a clear breach of duty on the part of the managing officials of the corporation under their trust.
2. There is such mismanagement and clear breach of duty where the officers of the corporation have sold 15 per cent. in amount and vastly more than 15 per cent. in value of the assets of the corporation (all real estate) at approximately one-seventh of its value, thereby apparently entailing a loss of \$2,618,000 on the corporation, and \$870,000 on the complaining stockholder; and refuse or neglect to bring suit to set aside said sale, although the right to cause the sale to be set aside on the ground of lesion beyond moiety appears to be unquestionable under the laws of the State in which the property is situated.
3. The petition of a stockholder alleging such gross mismanagement, and alleging that the complainant has exhausted all available means for obtaining redress through corporate agencies, and impleading the corporation and the purchaser, and praying that the sale be set aside for lesion beyond moiety, shows a cause of action.
4. In setting forth a cause of action for annulling a sale because of lesion beyond moiety it is not necessary to allege that the complainant, or any one else, is willing to buy the property at double the amount of the price of the sale complained of. It is sufficient to allege the discrepancy between price and value. The fact of anyone being willing to buy the property at the increased appraisement is merely a fact to be considered on the merits in proof of the alleged greater value.
5. For the purposes of the trial of an exception of no cause of action, all the well pleaded allegations of fact of the petition are taken for true.

A PPEAL from the Fifteenth Judicial District, Parish of Cameron.
—*Miller, J.*

Farrar Jones & Kruttschnitt and *A. H. Leonard*, for Plaintiff,
Appellant.

Pujo & Moss, and *Denegre, Blair & Denegre*, for Defendant, Appellee.

The opinion of the Court was delivered by

PROVOSTY, J. The plaintiff brings this suit in his capacity of stockholder in the defendant corporation to set aside, because of lesion beyond moiety, a sale made by the officers of the corporation to the co-defendant, Patillo Williams. The defendants plead no cause of action, the defendant, Patillo Williams, adding the reasons why, in his opinion, the petition fails to show a cause of action. In abbreviated form the petition is as follows:

1st. That the North American Land and Timber Company, Limited, which will hereafter, for brevity, be referred to as the "Land Company," is an English corporation, whose objects and purposes, among other things, are to acquire lands, mines, ways and water rights in the United States; to settle, improve, cultivate, sell and let such lands; to cut, convert and sell the timber thereon, and to work the mines and minerals therein and thereunder; to develop the resources of the lands and property; to carry on all of the business usually conducted by land companies in all their branches; to construct, maintain and improve, or aid in or subscribe towards the construction, maintenance and improvement of roads, streets, bridges, tramways, railways, canals, wells and other works necessary or convenient for the purposes of the company; to aid, encourage and promote immigration to the property of the company and to colonize the same, and to carry out many other objects, which, however, are not specified in the petition because not peculiarly pertinent to its subject-matter, and not necessary to be enumerated.

2nd. The petition recites the history of the capitalization of the corporation, showing that its capital to-day is \$630,000, whereof complainant holds \$178,000, or 28¼%.

3rd. The petition next alleges that the company in 1883 acquired, by purchase, and practically entirely from petitioner, lands in the Parish of Calcasieu, Vermilion and Cameron, to the aggregate amount of about 880,000 acres, whereof there remain, or did remain in the ownership of the Land Company on June 30th, 1901, 800,000 acres or thereabouts, and that the land so acquired has been held since the date of its acquisition in 1883 for the objects of the corporation, to be disposed of as contemplated by the charter of the association, gradually to settlers or others, at the full market value of the same.

4th. That included in the lands were 153,887 17-100 acres of land in the Parish of Cameron, which are described by township and range.

5th and 6th. That by two alleged contracts, dated respectively February 4th and February 11th, 1901, but registered March 16th, 1901, in the Parish of Cameron, the company contracted to sell to one Patillo Higgins the above real estate at the price of \$3.00 per acre, whereof 5 cents per acre cash, balance on or before twelve months from date, with 8% interest from date, and copies of the two contracts are annexed to and made parts of the petition. From them it will appear that a right is granted for a further extension of time at the end of a year, if one-half the purchase price be paid.

7th. The petition next alleges a trifling and immaterial amendment in the two agreements of sale, as per document annexed to the petition.

8th. That petitioner is informed and believes that the alleged contracts and agreements were not authorized by due corporate action, or by the power of attorney granted to one Eastman, who made the sales as agent of the corporation, but that if the agreements were authorized and constitute perfected contracts of sale, they are subject to the right of the corporation to rescind the sales for lesion beyond moiety, for this: that the lands at the time when the agreements were made were worth the sum of \$20.00 per acre cash, and far more, on such terms as those stipulated in and by the contracts, and that they are, to-day, worth still more than as hereinabove set forth.

9th. The petition further avers that, although the corporation is a foreign corporation, all of whose officers and directors reside in England, and although petitioner would therefore be excused from attempting to provoke corporate action before instituting this suit, still, as matter of fact, he did, on or about the 6th of February, 1901, notify the corporation, by cablegram addressed to its secretary at London, that the first described sale was disastrous; that it should not be approved, and that the land was worth many times the sum named; that the company had never vouchsafed any answer to his cablegram, but that, notwithstanding the cablegram, said Eastman, claiming to represent the corporation, entered into the second contract complained of.

10th. The bill next alleges in detail the excitement due to the discovery of oil at and near Beaumont on January 10th, 1901, and the immediate and enormous increase of values in the vicinity in consequence thereof; that the discovery of oil also attracted the liveliest attention to the necessity of shipping facilities at and along Sabine Lake and Sabine Pass, so that the lands of the Timber Company, which extended along the whole of Sabine Pass, from Sabine Lake

to the Gulf of Mexico, immediately acquired a large and increased real value and a larger speculative value for commercial purposes, as also by reason of the probable existence of oil under the same; and that the lands belonging to the company and situated in the Parish of Cameron are, where the same abut on Sabine Pass, only between twenty and thirty miles from Beaumont.

The tenth paragraph further expressly avers that the lands, entirely irrespective of their speculative value, were on and continuously after February 4th, 1901, up to date, worth \$20.00 per acre in cash.

11th. The petitioner next alleges that, although he has not such knowledge as would justify him in charging actual fraud against the directors and officers of the company, yet that the acts of the directors in selling approximately 154,000 acres of land of the company, constituting more than fifteen per cent. in extent of the lands, and vastly more than fifteen per cent. in value, at the vile price and on the ridiculous terms averred, shows such gross mismanagement, waste, misuse and misapplication of the property of the corporation as to constitute a fraud in law, and as to entitle petitioner to file this petition for the benefit of the corporation, for the purpose of staying said sales, if incomplete, or of rescinding them for lesion beyond moiety, if complete.

12th. The petition further averred that Eastman, who resided at Lake Charles, Calcasieu Parish, was the agent and manager of the corporation in the State of Louisiana authorized to accept service for it; that Patillo Higgins was absent from the State and resided at Beaumont in the State of Texas.

The prayer was that the corporation and Higgins be cited; that the sales should be adjudged and decreed to have been executed without authority; but, if executed with authority, then that the court should decree them affected by, and rescinded on account of, lesion beyond moiety; and that the court should fix the just value of the real estate at the time of the contracts, and should decree that Higgins should either make up the just price of the property and pay the same at the same time provided for by the contracts and agreements, or, in default thereof, that the sales should be decreed annulled and rescinded for lesion beyond moiety, and the lands restored to the company unincumbered and unaffected by the contracts, and that in such event the price already paid by Higgins should be returned to him with interest at five per cent. per annum from date of payment until restored to him.

The contention of the defendants is that the petition exhibits nothing more than an attempt by a stockholder to control, with the aid of the court, the action of the managing agents of the corporation, representing the majority of the stockholders; and that this cannot be done in the absence of allegations of fraud, *ultra vires*, breach of trust, or gross negligence or misconduct, none of which are alleged. Citing, North American Land and Timber Co. vs. J. B. Watkins, 109 Fed. Rep., 101; IV Thompson's Com. on the Law of Corp., para. 4480, fig.; 1 Morawetz on Private Corp. (2nd Ed.), § 203; 1 Cook on Stockholders (3rd), § 11; Low vs. Pioneer, etc., Co., 70 Fed. Rep., 646; Dudley vs. Kentucky High School, 9 Bush, 578; Gamble vs. Queen's County Water Co., 123 N. Y., 91, 99; Wisner vs. Delhi Land and Improvement Co., 46 Ann., 1223, 1230. And the contention of defendants is, further, that the allegation that the land in question is worth \$20 per acre, and the allegation that the same land has been sold by the managing officers of the company at \$3 per acre, when taken together, amount to this, that, in the judgment of the plaintiff, the land is worth \$20, whereas, in the judgment of the agents of the company, it is worth \$3, and that the suit is practically an attempt to substitute the judgment of the plaintiff for that of the agents of the defendant company; and the contention of the defendants is, further, that, apart from the value of the lands, there is involved in the matter a question of policy—whether, considering the large holdings of the defendant, it was not good policy to sell, even at a vile price, and whether, even if the lesion were conceded, it would not be bad policy on the part of the defendant to repudiate one of its own sales, considering that its business is to traffic in lands, and that it has large holdings yet undisposed of; and defendants contend that the policy of a corporation as to whether to bring suit to set aside a contract entered into by it, cannot be controlled by the courts at the suit of a stockholder or of a minority of the stockholders.

As one of the reasons why he contends that the petition fails to show a cause of action, the defendant, Patillo Williams, in his pleadings, calls attention to the fact that the petition does not allege that the plaintiff, or any third person, is willing to buy the land at twice the amount of the price of the sale. If by this is meant that such an allegation is necessary to support an action to set aside a sale for lesion beyond moiety, the contention is without merit. The action for lesion beyond moiety is statutory, and the statute regulating it

prescribes no such requisite. The statute in question is embodied in Articles 2589, 2590, 2591 and 1870, Civil Code, as follows:

"ART. 2589. If the vendor has been aggrieved for more than half the value of an immovable estate by him sold, he has the right to demand the rescission of the sale, even in case he had expressly abandoned the right of claiming such rescission and declared that he gave to the purchaser the surplus of the thing's value.

"ART. 2590. To ascertain whether there is lesion beyond moiety, the immovable must be estimated according to the state in which it was, and the value which it had at the time of the sale.

"ART. 2591. If it should appear that the immovable estate had been sold for less than one-half its just value, the purchaser may either restore the thing and take back the price which he has paid, or make up the just price and keep the thing."

"ART. 1870. When lesion is alleged to invalidate a partition or sale, the party alleging it must first prove the value of the property sold, in the state in which it was at the time of the contract, according to the usual terms of credit given on sales of property of that description. He must then show how much the price given was less than such value; but, if the price given was paid at longer periods than those usually given on such sales, the interest for the time exceeding such usual credit must be deducted from such price; or, if the price was paid in shorter periods than those of such usual credit, then the interest for the time such payment has fallen short of the usual credit shall be added to the price actually paid; and from a comparison of the price after these additions or deductions with the estimated value, the court shall determine whether, according to law applied to the circumstances of the case, there is a lesion sufficient to invalidate the contract."

But, from the tenor of the argument, both oral and printed, we understand the insistence of defendants to be, not so much that such allegation is necessary to support an action for lesion beyond moiety, as that it is necessary to justify the court in entertaining the appeal of plaintiff for interference in the affairs of the corporation; in other words, that such an allegation is necessary to make out a case on the face of the petition justifying the court in interfering with the affairs of the corporation at the instance of a stockholder. Even for the latter purpose we do not think such an allegation was requisite. The fact of any one being willing to buy the land at the increased price is

merely a fact in the case to be considered on the merits in proof of the greater value of the land.

Since the case is presented on exception of no cause of action, for the determination of which every well-pleaded allegation of fact of the petition must be taken for true, we can lend no weight to the arguments of defendants—however plausible—going to show that the alleged greater value of the land is mere matter of opinion on the part of plaintiff, and is in all probability not true. Under the pleadings, we have to assume that plaintiff will prove on the trial every allegation of his petition; and, such being the case, the matter before us for consideration is whether, where the officials of a corporation have sold fifteen per cent. in amount and “vastly more than fifteen per cent. in value” of the assets of the corporation at approximately one-seventh of its value, thereby apparently entailing a loss of \$2,618,000.00 on the corporation, and \$870,000.00 on the complainant, such assets being all real estate, a cause of action is, or not, shown for interference by the courts with the affairs of a private corporation at the prayer of a stockholder.

The reluctance of courts to interfere at the instance of a stockholder, or of a minority of the stockholders, with the affairs of a private corporation is very pronounced; but their right and their duty so to interfere in a proper case is indubitable, and the question recurring in every case is whether the particular case is a proper one for interference.

Mr. Thompson, in his work on Corporations, 4th Thompson on Corporations, Sec. 4487, states the law on this subject as follows:

“SEC. 4487. *Equity will not interfere on questions of corporate management or policy.* Other decisions emphasize the principle that courts of equity cannot undertake the management of all the private corporations in the country; that, in the absence of usurpation, of fraud, or of gross negligence, they will not interfere, but will allow the majority to rule, and leave dissatisfied stockholders to redress their grievances through ordinary corporate methods. The governing principle has been clearly outlined by Vice-Chancellor Green in the following manner: ‘Individual stockholders cannot question, in judicial proceedings, the corporate acts of directors, if the same are within the powers of the corporation, and in the furtherance of its purposes, are not unlawful or against good morals, and are done in good faith and in the exercise of an honest judgment. Questions of policy, of man-

agement, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation.' According to the reasoning of another court, the acts of the officers of the corporation which do not violate the constitution or charter of the company will not be controlled by any court at the instance of a stockholder, unless it is shown to have been a wilful *abuse* of their *discretion*, or the result of *bad faith*, or of a *wilful neglect* or breach of a known duty. Upon this subject it has also been said by Peckham, J.: 'To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interests. Otherwise the court might be called upon to balance probabilities of profitable results to arise from the carrying out of the one or the other of different plans proposed by or on behalf of different shareholders in a corporation, and to decree the adoption of that line of policy which seemed to it to promise the best results, or at least to enjoin the carrying out of the opposite policy. This is no business for any court to follow.'"

In the instant case, always assuming the existence of the wide discrepancy between the price of the sale and the real value of the property, there is, in our opinion, exhibited a case necessitating the interference of the courts, and justifying the allegation contained in the 11th paragraph of the petition, namely, that, although the petitioner "has not such knowledge as would justify him in charging actual fraud against the directors and officers of the company, yet that the acts of the directors in selling approximately 154,000 acres of land of the company, constituting more than fifteen per cent. in extent of the lands and vastly more than fifteen per cent. in value, at the vile

price and on the ridiculous terms averred, shows such gross mismanagement, waste, misuse and misapplication of the property of the corporation as to constitute a fraud in law, and as to entitle petitioner to file this petition for the benefit of the corporation, for the purpose of staying said sales, if incomplete, or of rescinding them for lesion beyond moiety, if complete."

If this discrepancy really exists between price and real value, the refusal or neglect to bring a suit to avoid the sale cannot be accounted for by mere business judgment and policy; the discrepancy is too great and the resulting loss too great. Such a sale and such refusal or neglect to take advantage of the plain provisions of our statute to avoid it constitute, in our opinion, mismanagement of the affairs of the corporation such as would justify the appointment of a receiver under Section 1 of Act 159 of 1898, paragraph 2, which provides for the appointment of a receiver "at the instance of a stockholder or creditor, when the directors or other officers of the corporation are jeopardizing the rights of stockholders or creditors by grossly mismanaging the business or by committing acts *ultra vires*, or by wasting, misusing or misapplying the property or funds of the corporation." If the appointment of a receiver is justified, *a fortiori* is the milder remedy of a suit like the present one. In the case of *Marcuse vs. Gullett Gin Mfg. Co.*, 52 Ann., p. 1394, this court intimated its opinion of the propriety of bringing such a suit rather than resorting to the harsher remedy of the appointment of a receiver. It said:

"Precisely why the beneficial legal results for the corporation which the plaintiff declares he is seeking to obtain, and to which he might be entitled, could not be as fully and completely worked out by himself, as a stockholder, through proper proceedings taken contradictorily with all parties in interest, we cannot see."

If such discrepancy exists, the bounden duty of the managers of the corporation, in the discharge of their trust, is to bring suit to annul the sale. Except that such duty is dependent for its proof on facts, instead of mere naked law, it is not to be differentiated from the duty to resist the payment of a tax, a breach of which duty has been recognized by the Federal Supreme Court, presumably the highest authority on such a question, as affording clear ground for interference by the courts at the instance of a stockholder. *Dodge vs. Woolsey*, 18 How., 331; *Pollock vs. Farmers' Loan and Trust Co.*, 157 U. S., 429; S. C. 158; U. S., 601; *Smyth vs. Ames*, 169 U. S., 466.

In conclusion, we will say that there are some features of the case which, while strictly not entering into the legal problem of cause of action *vel non*, yet are worthy of mention. These are that the managing agents of the corporation all reside in a foreign country and are presumably more or less dependent upon a local agent for information as to the value of the property in question; and, to quote the language of the brief of plaintiff, "this is not a suit brought by the holder of a trifling minority of the stock of the corporation, nor a suit brought by a small holder in order to vex and harass the management of the company; that it is a suit wherein the plaintiff, even if defeated, would be entitled to very nearly \$130,000 of the proceeds of sale of these lands, and that his interest, if his own views be correct, amounts to very nearly \$1,000,000; that the plaintiff comes before the court after exercising the utmost diligence to prevent the wrongs of which he complains; that his first complaint was made to the corporation, and made between the dates of the two sales, so that he tried to prevent the corporate action even before it took place, and he cannot for a moment be accused of sleeping on his rights; and that he endeavored to obtain relief through corporate agencies to the best of his ability before resorting to the court."

The whole case, in our opinion, hinges upon whether the allegations of value in the petition must be taken for true. If they are, there is made out a clear case where officers of a corporation prefer to entail enormous loss on the corporation rather than bring an action which they have a clear right to bring.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed; that the exceptions filed by the defendants be overruled; that the defendants be ordered to answer, and that this case be remanded to the lower court for further proceedings according to law; the defendants to pay the costs of this appeal other costs to abide the decision of the suit.

No. 14,279.

STATE VS. SAM BOLDEN.

SYLLABUS.

1. In enacting Statute 44 of 1890, it must be presumed that the Legislature did not intend that the law should be construed without reference to

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established principles, and that in making it a crime to shoot a person with intent to kill it was intended to cut off the right of self-defense or any other reasonable or lawful use of firearms.

2. Shooting in self-defense is actuated and controlled by the desire to protect one's life, and the desire to take life is not controlling and exclusive. It cannot be said to fall within the terms which denounce the act of shooting with intent to kill. In that view, the statute is not unreasonable nor absurd. *United States vs. Kirby*, 7 Wall. 482.
3. Even if the statute be unreasonable, to decree it void its provisions must be found in conflict with the Constitution. *L. R. A.*, Vol. 50, p. 56.
4. The title of an act may assist in removing ambiguities when the intent is not plain. The title, as well as the statute, is adopted by the Legislature and shows the object of the statute. *Fisher vs. Blight*, 2 Cranch. 586; *Burgett vs. Burgett*, Vols. 1 and 2, p. 221 of the Ohio Reports.
5. A title which serves to indicate the object of a statute cannot be held to have misled the Legislature when it was adopted.
6. "We, the jury, find the accused guilty of shooting with intent to kill," is a legal verdict under Statute 44 of 1890. *State vs. Broussard*, 106 La. (Not yet reported).

A PPEAL from the Eleventh Judicial District, Parish of Natchitoches.—*Porter, J.*

Walter Guion, Attorney General, and *W. A. Wilkinson*, District Attorney (*Lewis Guion*, of Counsel), for Plaintiff, Appellant.

Scarborough & Carver, for Defendant, Appellee.

The opinion of the court was delivered by

BREAUX, J. Defendant was indicted for shooting Sam Cook with intent to kill and murder, under Section 791 of the Revised Statutes as amended by Statute 43 of 1890. He stood his trial and the jury found him guilty of shooting with intent to kill, under Act 44 of 1890. The defendant interposed a motion in arrest of judgment, which was sustained. The State appeals.

The motion sets forth six grounds, only two of which were argued in the brief and at the bar: the third and sixth. They present the defense urged here.

The first proposition in order of the argument is that Act 44 of 1890 is unconstitutional and the other that the verdict finds no crime. Learned counsel for the accused points to the fact that the title of Act 44 of 1890, makes it a crime to "wilfully" shoot any person with intent to kill, while this word is not contained in the body of the Act, but makes it a crime to shoot any person with intent to kill, whether,

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counsel contends, the shooting is done wilfully or not. Counsel further contends that this cuts off the law of self-defense and that under this Act one may be found guilty who has committed no offense for which he should be punished; that the Legislature did not intend to cut off the law of self-defense, and that it is evident that they were misled by the title of the Statute.

The unconstitutionality urged presents a serious issue for our consideration. The objection is, in substance, we take it, that the law in question is unreasonable and leads to an absurd consequence; that it makes an act a crime without reference to a specific intent. We can only say in answer that such acts have heretofore been adopted and been enforced. But the illegality charged lends itself readily to argument in support of the theory of unreasonableness and absurdity and to striking and harrowing illustrations of possible wrongs and oppressions. The argument is not unanswerable. It has been again and again answered and it has been held that the statute should be so construed as not to sanction an injustice and a wrong or a consequence utterly absurd. We must presume that the Legislature did not intend that the law should be construed without reference to established principles.

The reason of the law is to be consulted and not exclusively the cold letter.

In *State vs. Ribley*, 49 Ann. 1619, we quoted from the text of Cooley, which we thought conclusive. For the sake of some brevity we do not reinsert the excerpt here. The language of Mr. Justice Field, in *United States vs. Kirby*, 7 Wall. 482, may well be repeated. There are cases in which the reason of the law should prevail over its letter.

"The common sense of man approves the judgment mentioned by Puffendorf that the Bolognian law which enacted that whoever drew blood in the streets should be punished with the utmost severity, did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling cited by Plowden that the Statute of 1st Edwards II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, for he is not to be hanged because he would not stay to be burnt."

In the decision from which we quote the foregoing, a mail carrier was arrested by a State officer on an indictment for murder. The act committed, it seems, came within the letter of the law. When the acts

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which create the obstructions are in themselves unlawful, the intention, the court said, to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object. The statute has no reference to acts lawful in themselves from the execution of which a temporary delay to the mails unavoidably followed. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence." Applying that rule here, the statute attacked does not make an offense that which is lawful or innocent.

In the well considered case of *People vs. Mahany*, 1 Maddaugh (Mich.), 501, the attack was made because it violated fundamental principles. The court said: "An unbroken series of decisions has settled the rule of law that before we can declare an act of the Legislature invalid, its provisions must be found in conflict with the Constitution," citing a number of decisions. See among the number another well reasoned opinion, *Ex parte Lorenzen*, L. R. A., Vol. 50, p. 56.

We have, to this point, considered the attack upon grounds most favorable to the defendant. We have conceded for the discussion that, perhaps, the law does lead to unreasonableness or absurdity. We are by no means convinced that this is the correct view. The enactment taken as a whole shows that it was not the intention to denounce an act in general terms without the least reference to a criminal intention. The title may be consulted as relates to intent. In England the doctrine holds that the title of an act is not part of it because added by the Clerk of Parliament, but this is not controlling when the Legislature make the title.

It was said by the Supreme Court of the United States in the case of *Fisher vs. Blight*, 2 Cranch, 586, that "the title of an act, when taken in connection with its other parts, may assist in removing ambiguities where the intent is not plain; for where the mind labors to discover the intention of the Legislature, it seizes everything, even the title, from which aid can be derived."

The Supreme Court of Ohio, in *Lessee of Burgett vs. Burgett*, Vol. 1 and 2, p. 221, Ohio Reports, said: "The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. The purpose of our statute appears from its title to be the prosecution of frauds and perjury, and although it is said that the title forms no part of the act (1 Lord Ray, 77), yet the reason of this *dictum* appears to be the practice of Parliament by which the

title is prefixed to the statute at the discretion of the clerk of the house in which the bill originated, but such is not the practice with us. The title is framed in the same manner as the bill and is sanctioned by the vote of both branches of the Legislature. We may, therefore, consider it as explanatory of the object of the law."

With us every law shall embrace one object and that shall be expressed in the title (Art. 31, Const). In that view the title has an importance which it would not have if the law were entirely silent upon the subject. The title in this State is always considered, to some extent, as part of the statute. It is plain that no one innocent could be made to suffer penalty in the presence of a title which announces that the law's object is to make that a crime which a person has committed wilfully.

But it is further contended that the Legislature was misled by the title. The statute has not heretofore in any of the cases been attacked upon this ground. Read with the statute, as one assisting the other, there is no reason in our view, to infer that the Legislature was misled.

The next ground of defendant's objection is that the verdict finds no crime. The verdict reads: "We, the jury, find the accused guilty of shooting with intent to kill." In a case recently handed down we had occasion to consider a similar verdict. We reached the conclusion that it was a good verdict, and affirmed the sentence. We have found no good reason to change our views as expressed in that case. *State vs. Eugene Broussard*, 106 La. (not yet reported).

Defendant's contention also is that the verdict does not find that "any person was shot," and that the accused should have been named in the return as the one found guilty. We deem it answer enough to say that the verdict is sufficiently complete without special mention of the name of the accused. The crime with which defendant is charged is distinguished into degrees. Statute of 1890, Section 791 of the Revised Statutes, and Statute 44 of the same session, denounce different degrees of a crime. We take it that the crime being distinguished in degrees, the jury may find the degree of which the defendant is guilty of shooting with intent to kill under the last statute, without setting forth the name of the accused.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the court sustaining the motion in arrest of judgment be annulled, avoided and reversed.

Grinage vs. Publishing Company.

It is further ordered, adjudged, and decreed, that the case be reinstated on the docket of the court, the motion in arrest of judgment overruled, and that the case be proceeded with from that point in accordance with law and the views before expressed.

Rehearing refused.

No. 13,816.

MR. AND MRS. J. R. GRINAGE VS. TIMES-DEMOCRAT PUBLISHING COMPANY.

107	121
121	552
107	121
125	552

SYLLABUS.

1. The rule is that an act of the General Assembly must be held constitutional unless its repugnance to the organic law is apparent and reasonably certain.
2. Courts are not justified in holding a statute void because of mere doubts arising on the construction of the two—the statute and the Constitution—the one in reference to the other.
3. That construction must obtain which would give the statute constitutional life rather than another construction, of which it might be susceptible, which would strike it with constitutional death.
4. The constitutional declaration that the courts shall be open, and every person, for injury done him in his rights, lands, goods, person or reputation, shall have adequate remedy by due process of law, etc., is not to be understood as taking from the Legislature the power to prescribe reasonable rules and regulations relative to the costs incurred in litigation.
5. Regulating the collection of costs due to clerks of courts and other officials (a phrase found in the title of the act assailed), is a term broad enough to cover the requirement of security for costs which the statute authorizes the defendant to exact of the plaintiff.

A PPEAL from the Civil District Court, Parish of Orleans—
Theard, J.

E. A. O'Sullivan, for Plaintiffs, Appellants.

Clegg & Quintero, and *Lawrence O'Donnell*, for Defendant, Appellee.

The opinion of the court was delivered by
BLANCHARD, J. Plaintiffs appeal from a judgment dismissing their suit.

This action of the trial court came about in this way:—

Counsel for defendant, suggesting to the court that the taking of testimony in the case and the proceedings to be had therein would

involve considerable expense, and that defendant was entitled to be protected by bond and security for costs, moved for an order on plaintiffs to furnish bond and security in the sum of fifty dollars, or in default thereof that their suit be dismissed.

The court granted the order, predicated its action upon Section 4 of Act 136 of 1880.

Whereupon, plaintiffs took a rule upon defendant to show cause why the order should not be set aside and annulled, alleging as grounds for such annulment the unconstitutionality of the Section of the Act referred to.

The trial of this rule resulted in the denial of its prayer, and, thereupon, counsel for defendant moved for the dismissal of plaintiffs' suit because of failure to furnish the bond and security for costs within the time fixed by the court.

This motion prevailed and judgment of dismissal was entered up.

Act 136 of 1880 is an act to fix the fees of the clerks of the Civil and Criminal District Courts of the Parish of Orleans, and those of the other officials of that parish, *to regulate the collection of said fees*, and directing other things germane and pertinent to the subject matter of the fees, and their collection, of the officers named in the act.

The title to the Act is a long one. It is not necessary to recite it in full. That portion of it with which we are called upon presently to deal is embraced in the words italicised above.

Section 4 of the Act enacts that the defendant in any cause shall have the right to require the plaintiff to give bond for costs, in such amount as the court may fix, to secure repayment, on final determination of the suit, of the costs expended by such defendant therein.

It further provides that the order requiring such security shall issue *ex parte* on the application of the defendant, and no further proceedings shall be had in the cause until the security be furnished; that the court shall fix the delay within which the bond is to be given and the failure to give it within such delay shall operate a dismissal of the suit as in case of non-suit; that in all cases the security for cost shall be considered a party to the suit and shall be condemned *in solido*, with the principal, for the amount of costs recoverable.

The contention of the appellants is that the Act of 1880 contravenes Art. 29 of the Constitution of 1879 in this, that it embraces more than one object, and that the body of the Act, in its Section 4, deals with a matter not set forth in its title.

They hold that the title to the act cannot fairly be construed to embrace within its grasp, in the constitutional intendment, the subject matter and object set forth in Section 4, and that, therefore, Section 4 is to be eliminated from the law as without constitutional warrant and validity.

The rule is that an act of the General Assembly must be held constitutional unless its repugnance to the organic law is apparent and certain.

Courts are not justified in holding a statute void because of mere doubts arising on the construction of the two—the statute and the Constitution—the one in reference to the other.

If nothing more than a doubt is cast upon its constitutional validity, such doubt must be resolved in favor of its validity, and the statute sustained. That construction must obtain which would give it constitutional life, rather than another construction, of which it might be susceptible, which would strike it with constitutional death.

The constitutional declaration that the courts shall be open, and every person for injury done him in his rights, lands, goods, person or reputation shall have adequate remedy by due process of law, etc. (Art. 6, Const. of 1898), is not to be understood or construed as taking from the Legislature the power to prescribe reasonable rules and regulations relative to the costs incurred in litigation. Succession of Groves, 49 La. Ann. 1051.

When a person is impleaded in the courts his right to make defense thereto arises and he, necessarily, in many cases, incurs expense. While a plaintiff is primarily bound for the costs of a suit he institutes, it is not always true that he is financially able to respond. A defendant may make large outlays in vindicating his position, and may successfully vindicate it, and yet at the end of the suit, with a judgment discharging him, may be unable to recoup his expenditures.

Therefore it is, that the requirement of a bond for costs has always been sustained. It may take the form of authorizing or requiring the clerk of court to exact of the plaintiff a bond for all costs, or it may take the form of authorizing the defendant to exact of the plaintiff a bond to cover the costs which he (defendant) may incur in his defense.

Either would be a reasonable provision of law.

The statute under consideration authorizes the defendant to exact a bond for costs. The act is one dealing with the fees of clerks and

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sheriffs of certain courts. All, or a large part, of the expenses defendant may incur in its defense may be costs due to those officials.

How, then, can it be claimed that giving the defendant the right to demand of the plaintiff security for his costs is not covered by the words in the title of the act:—"to regulate the collection of such fees?"

Regulating the collection of costs is a term broad and comprehensive enough to cover the requirement of security for costs, and as defendant may incur obligation for costs and pay out money for costs in the preparation of its defense, it is not without the pale of the title of the act when the body thereof authorizes the exaction from plaintiffs of a bond for the costs it may expend.

The bond, even though exacted at the instance of defendant, enures, at last, to the benefit of the clerk and sheriff, and is, therefore, pertinent and germane to the subject with which the act deals, to-wit:—the costs of those officials. See *Hope et als. vs. City of New Orleans*, 30 South, 842.

Judgment affirmed.

107	124
120	443

No. 14,026.

R. H. McCLELLAND ET AL. VS. GREENWICH INSURANCE COMPANY.

SYLLABUS.

1. It is not improper practice to join with the insured, as plaintiff in an action on a policy of assurance against fire, the party who is named in the policy as beneficiary thereof to the extent that his interest may appear.
2. After the Insurance Company's adjuster had visited the scene of the fire, had taken the measurements of the burned building, had suggested the employment of an architect to make estimate of the cost of replacing the structure, had possessed himself of the books and invoices of the insured, had gone over them carefully, had acquired information of all necessary facts and figures and then had made the insured an offer of a given sum in settlement of the loss, which was declined, the company is not in a position, when sued, to urge in defense that it is not shown any written notice of the fire, nor preliminary proofs of loss were delivered to it as the terms of the policy require.
3. The fact that the tax collector had recovered a judgment against the insured, which had not been paid at the date of the insurance, and which operated as a lien on the property, and the fact that the land upon which the storehouse was located was still encumbered with the vendor's privilege to secure part of the original purchase price, did not invalidate the contract

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of insurance in the absence of a showing by the defense that a particular statement of interest had been required of the insured, either by the terms of the policy, or otherwise, and he had made fraudulent concealment or misrepresentation of such interest.

4. The fact that the insured owed debts, which operated as a lien or mortgage on the property, did not take the property out of the category of the "unconditional and sole ownership" requirement of the policy.
5. The clause in the policy to the effect that "the entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void if any change, other than by the death of the assured, take place in the interest, title or possession of the subject of insurance (except change of occupants, without increase of hazard), whether by legal process or judgment, or by voluntary act of the assured, or otherwise." was not invalidated by a mere formal seizure by the sheriff of part of the goods insured, which did not actually dispossess the insured.

A PPEAL from the Twenty-first Judicial District, Parish of Pointe Coupee—*Claiborne, J.*

Yoist & Hewes, for Plaintiffs, Appellees.

O. B. & S. Sansum, for Defendant, Appellant.

The opinion of the court was delivered by

BLANCHARD, J Plaintiff, R. H. McClelland, owned a store house and the ground it was situated on, and a stock of goods, wares and merchandise which had been placed in the premises. He was a country merchant .

He became indebted to S. Gumbel & Co. for advances made, and, it seems, they, for their own protection and his, took out a policy of insurance against fire, in the name of McClelland, in the sum of \$2,500 as follows: \$600 on the building, \$200 on the furniture and fixtures, and \$1700 on the stock of goods—the policy reading: "loss, if any, payable to S. Gumbel & Co. as interest may appear."

The store house and its contents were destroyed by fire and the parties failing to agree as to the amount of loss to be paid, this suit was brought by McClelland and Gumbel & Co. as joint plaintiffs.

From a judgment in their favor for \$2466.93, defendant prosecutes this appeal. Of the amount awarded, it was decreed that \$410.56 be paid to Gumbel & Co. as the extent of their interest in the policy; the remainder to the plaintiff McClelland.

To defendant's objection that Gumbel & Co. were improperly joined as parties plaintiff, it suffices to say that the policy itself stipu-

lates an interest in it in their favor, and to the extent of that interest it was not improper practice for them to join with McClelland as plaintiffs in the action.

The evidence discloses that defendant company sent an adjuster to the plaintiff McClelland at the scene of the fire, that he took the measurements of the burned building and at his suggestion an architect was employed to make an estimate of the cost of replacing it; also that the adjuster took the plaintiff's books relating to his mercantile business, the invoices of goods, etc., away with him, went over them carefully, and thus possessed himself of all necessary facts and figures.

Later, the parties met in New Orleans, at the office of the Insurance Agent who had issued the policy, and there the company's adjuster (the same who had been sent to the scene of the fire) offered plaintiffs \$1600 in full settlement of the loss. This was refused, plaintiffs expressing their willingness to accept \$1800. The adjuster declined to increase his offer to that sum.

After this, we hardly think the Company is in a position to urge in defense that it is not shown any written notice of the fire, nor preliminary proofs of loss, were delivered to it, as the terms of the policy require.

The evidence sufficiently discloses, we think, the insurable interest of the plaintiff McClelland in the property destroyed by the fire. It is made plain that he owned the store building and its contents, and sufficiently so that he owned the ground upon which the building was located.

The fact that the tax collector had recovered a judgment against McClelland on behalf of the State and the parish, aggregating \$220, with penalties and cost, which had not been paid at the date of the insurance, and which operated as a lien and privilege upon all the movable, and a mortgage on all the immovable, property he owned, and the fact that the land upon part of which the storehouse was located was still incumbered with a vendor's privilege to secure part of the original purchase price thereof, did not invalidate the contract of insurance in the absence of a showing made by the defense that a particular statement of interest had been required of the insured and he had made fraudulent concealment or misrepresentation of such interest. Richards on Insurance, 2nd Ed., Sec. 136, p. 143; Sec. 145, p. 155; Wood on Insurance, 2nd Ed., Vol. 1, Sec. 168, pp. 387-8; Am. & Eng. Ency. of Law, Vol. 7, 1st Ed., p. 1020; Ins. Co. vs. Haven, 95 U. S. 249.

With reference to this, this Court said in *Adema vs. Ins. Co.*, 36 La. Ann. 655:—

But unless the true ownership or interest in the property is required by the conditions of the policy to be specifically and particularly and accurately set forth, it will be in general sufficient if the assured has an interest under any status of ownership or possession, in cases where no inquiries are made at the time the application is presented or the policy executed.

It does not appear that any inquiries were made at the time the application for this insurance was presented touching the status of the property as to the interest of the assured therein, or as to liens or mortgages thereon, and we do not construe the conditions of the policy as requiring ownership or interest in the property insured to be *specifically and particularly set forth*. The fact that the insured owed debts, which operated as a lien or mortgage on the property, did not take the property out of the category of the "unconditional and sole ownership" requirement of the policy. *Richards on Insurance*, 2nd Ed., Sec. 143, p. 153.

The morning of the day the fire occurred a deputy sheriff of the Parish visited plaintiff's store, armed with a writ of *feri facias* that had issued on the judgment, which the tax collector had recovered against him, and under authority of this writ announced a seizure of a show case and its contents, one lot of notions, one lot of woollen goods, another of cotton goods, one lot of gingham, one lot of hats, one hundred and twelve pairs of shoes and eighty-four pieces of calico. The goods thus levied on, it appears, constituted but a comparatively small portion of the stock on hand. The main portion of the stock, and the building and ground upon which it is situated, he did not disturb.

The contention of the defendant is that what the deputy sheriff thus did rendered void the whole policy, and in support of this cites a clause in the policy to the effect that if any change, other than by the death of the assured, take place in the interest, title or possession of the subject of insurance (except change of occupants, without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, the entire policy is vitiated.

The contention of the plaintiffs is that to avoid a policy of insurance by reason of seizure made under execution, the seizure must be effectual, and that what the deputy sheriff did evidenced neither in fact or in law a seizure of the goods—that there was *no actual taking of possession*.

The evidence discloses that the deputy sheriff did not take the goods out of the store; he left them there; he did not lock the store and take the key away with him; he did not dispossess the plaintiff McClelland of his occupancy of the store; McClelland continued to occupy it, continued his business as merchant in it, continued to sell from the stock which the deputy sheriff had not disturbed; no keeper was appointed to the goods which the sheriff announced he seized—at least it does not appear that he appointed one; his return on the writ does not so state; the officer seems to have merely set apart certain goods and informed the defendant in execution that he had seized them.

This was not an effectual seizure. There was no actual dispossession of the owner. The levy upon the goods was merely formal. McClelland's possession was not divested.

In *Western Assurance Co. vs. Laver*, 14 Ins. Law Journal 552, the sheriff levied on the stock of a manufacturer, and placed a bailiff in charge, who was instructed not to interfere with the business of the concern. He was required only to allow nothing to be taken away. The work of the factory, under the surveillance of the bailiff, continued in the usual manner. It was held that the possession of the sheriff was so much a qualified one as not to be a violation of the policy against "change of title or possession by legal process or judicial decree."

Ostrander on Fire Insurance, 2nd Ed., Sec. 78.

In *Smith vs. F. & M. Mutual Fire Ins. Co.*, 8 Ins. Law Journal, 828, it was held that the condition relied on (change of title or possession by legal process) has no application in the case of a mere technical seizure. *Ib.*

So, also, in *May vs. Standard Fire Ins. Co.*, 5 Ont. App. 605, under a clause importing, substantially, the same condition, an execution was issued against the chatels insured and the bailiff made a formal seizure, but did not interfere with the assured's custody or possession, and did not place any one in charge of the property levied upon. A bond was given soon after and the seizure released. It was held that the obligation of the Insurance Company on the policy had not been affected; that the condition of the policy referred to 'change of possession that was actual, not constructive. *Ib.*

In *May on Insurance*, Sec. 274. (2nd Ed.) it is said: "A seizure of the goods insured, though taken into the actual possession of the sheriff, is not an alienation, if there is no removal." The same author, in the same section, declares that "A mere technical levy upon real estate

State vs. Smith.

or personal property unaccompanied by change of possession or increase of risk, is not within the meaning of a policy which provides that insurance shall cease if the property be levied upon or taken into possession or custody."

In *Hennen Bros., Lindauer & Co. vs. Katz Bros et als.*, 41 L. R. A. 700, the identical clause, relating to change of possession through legal process, as contained in the policy in the instant case, was under consideration. There had been a seizure by the sheriff of the stock of goods insured, and the storehouse had been locked up and the sheriff had the key at the time of the fire. Nevertheless, the Supreme Court of Tennessee held the policy not invalidated by the seizure, on the ground that what the parties intended was that a change in the control and dominion over the property should not avoid the policy, unless such change rendered the risk more hazardous; that such was the meaning of those words in the clause embraced in parenthesis, to-wit: "except change of occupants, without increase of hazard." Several decisions of the New York Court of Appeals are cited as sustaining this view.

In the case at bar it is not necessary to go so far, and we are not to be understood as giving our entire adhesion to the doctrine announced in the Tennessee case. We prefer to rest our affirmance of the judgment appealed from on the mere formal character of the seizure made by the deputy sheriff, and on the decisions holding that none but actual seizure by the sheriff will so operate a change of possession as to render void the policy.

Judgment affirmed.

Rehearing refused.

No. 14,242.

107	120
113	893
113	894

STATE OF LOUISIANA VS. JOHN SMITH.

SYLLABUS.

1. District judges are authorized by law to appoint an attorney to represent the State when, from any cause, the district attorney is recused, necessarily absent, or sick.
2. "Necessarily absent," as used in the statute, means necessarily absent from the court; not from the parish.
3. The extreme illness of a grand-child, thought to be upon its death-bed, is held to have justified the absence of the district attorney from the court and warranted the judge in appointing a substitute.

State vs. Smith.

- 4 The attorney so appointed, having represented the State through the greater part of the trial, and having possessed himself of that knowledge of the facts necessary to the efficient argument of the case, is not to be retired from its further prosecution because of the reappearance in court, on the second day of the trial, of the district attorney. The trial is to be viewed as a whole, and *quoad* the same he remained the district attorney *pro tem.* to the end thereof.
5. The cause which necessitated the absence of the district attorney having ceased, it was the duty of that official to report to the court; and, having done so, it is unobjectionable that he participate in the prosecution.

A PPEAL from the Thirteenth Judicial District, Parish of Rapides
— *Blackman, J.*

Walter Guion, Attorney General, and *James Andrews*, District Attorney (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Hunter & Hunter, for Defendant, Appellant.

The opinion of the Court was delivered by

BLANCHARD, J. The accused was prosecuted for murder and convicted of manslaughter. From a sentence of fifteen years at hard labor, he appeals.

It appears from the record that on November 13, 1901, James Andrews, the District Attorney, represented to the Judge of the District (Court being in session) that he was unable to continue in attendance upon the court and to discharge the duties of his office because of the dangerous illness of his grand-child, who was thought to be upon its deathbed. In view of this, he suggested the appointment of John H. Overton, a member of the bar, to act in his stead for and on behalf of the State.

Whereupon Mr. Andrews was excused and Mr. Overton appointed to represent the State. He took the oath as District Attorney *pro tem.* and entered upon the discharge of his duties as such.

The following day, November 14h, the instant case was called for trial and its trial entered upon. All the State's witnesses in chief were examined that day, and most of defendant's witnesses.

The next day the trial was resumed, the defendant putting two character witnesses on the stand and himself going upon the stand. Then came some rebutting evidence by the State.

On this second day of the trial, at the hour of the assembling of the court, Mr. Andrews, the District Attorney, appeared and participated

in the prosecution of the case to the end, taking part in the argument. Mr. Overton also continued on in the prosecution, making the closing argument for the State.

At first no objection was made by the defense to the two participating in the prosecution. Later, however, when the State had called a witness in rebuttal, who was on the stand testifying to the reputation of two witnesses for the defense for truth and veracity, and had stated the same was bad, Overton asked the witness relative to some act of one of the defendant's witnesses. Counsel for defendant objected. This was followed by objection on part of the defense to Overton's further prosecution of the case on the ground that District Attorney Andrews, having reappeared in court and being then present prosecuting on behalf of the State, the appointment of Overton as District Attorney *pro tem* had elapsed, and he was *functus officio*.

Overton offered to retire if the court thought he should do so; otherwise he said he would continue on to the end of the case, discharging his duty under the oath he had taken.

District Attorney Andrews, at this juncture, stated to the court that if Overton retired from the case, it would be tantamount to the acquittal of the accused, for he, Andrews, had not heard the evidence, and understood that some of it was different from that adduced upon the preliminary examination of the accused.

The trial Judge was of the opinion that Overton should continue on to the end of the prosecution of the case, and so ruled.

To this ruling a bill of exceptions was reserved, and the matter was again brought to the attention of the court by being made the subject of a motion for a new trial, and one in arrest of judgment, both of which were overruled and bills reserved. These bills likewise challenge the legal correctness of the Judge's action in appointing Overton at all.

The questions arising for determination are, (1) on the showing made of reasons necessitating the absence of the District Attorney from the court, did the trial Judge err in excusing him and in appointing Overton to act in his stead; and (2) Overton having been thus appointed District Attorney *pro tem* was it legally permissible for him to continue on in the case, in prosecution thereof, after the reappearance of the District Attorney on the second day of the trial?

I.

The trial Judge did not err in excusing the District Attorney and appointing Overton in his stead.

The extreme, perhaps deadly, illness of a beloved grand-child was sufficient cause for Mr. Andrews' absence from the court. The state of mind, under the circumstances, of the grand parent was such, it may easily be imagined, as warranted him in asking to be excused.

A statute (Act 74 of 1886) authorizes district judges to appoint an attorney to represent the state when, *from any cause*, the District Attorney is recused, necessarily absent, or sick.

"Necessarily absent," as used here, means necessarily absent *from the court*—not *from the parish*, as is the contention of the defense.

A court is not to cease the performance of its functions because the prosecuting officer of the State is compelled to absent himself from it. And yet the business of prosecuting criminals before courts cannot go on without a prosecuting officer. Hence, the wisdom of the law empowering the judge of the court to supply the place of the District Attorney by the appointment of a member of the bar to discharge the duties of prosecuting officer. See *State vs. Johnson*, 41 La. An. 1076; *State vs. Montgomery*, 41 La. An. 1087; *State vs. Richard*, 42 La. An. 85.

II.

The appointment of Overton having been made necessary by the absence of the District Attorney, and he having conducted the prosecution of the case through the period of the introduction of the State's evidence, the examination of the State's witnesses, and having thus possessed himself of the facts of the case necessary to its argument before the jury, and having, too, alone represented the State during the greater part of the time when the defense was adducing its testimony, it would be an unreasonable requirement did the law exact his retirement *instantly* from the case the moment the District Attorney appeared in court.

It were a vain and futile thing to appoint him at all to conduct the prosecution of the case if the knowledge acquired in the course of the examination and cross-examination of witnesses called to testify, he is not to be permitted to utilize in argument, because, just prior to the argument, the District Attorney comes into court.

When the law spoke authorizing his appointment, it meant it to subserve a useful purpose. It intended that having, as the representative of the State, undertaken the prosecution of a criminal case called for trial, he should go on as such representative to the end of the trial.

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The trial is to be viewed as a whole, so far as the discharge of his duty in reference to it is concerned, and the unlooked for return of the District Attorney did not, as to the case on trial, revoke his appointment.

He was acting as District Attorney *pro tem.*, representing the State, when the trial was begun. As such he conducted the trial through the greater part thereof. Then the District Attorney appeared. But Overton, *quoad* that trial, remained the District Attorney *pro tem.* to the end thereof.

Such is held to be the reasonable intendment of the law and the common sense of the situation.

The cause which necessitated the absence of the District Attorney having ceased, it was the duty of that official to report to the court. This he did, and, being there, it was entirely unobjectionable for him to take part in the further trial of the case. Indeed, we rather look upon it as his duty so to have done.

Judgement affirmed.

MONROE, J. I am of the opinion that the counsel appointed to take the place of the District Attorney became *functus officio* when that officer appeared and resumed the discharge of his duties and that the subsequent participation therein of both the District Attorney and his substitute rendered the prosecution illegal. I, therefore, respectfully, dissent.

Rehearing refused.

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118 614

No. 13,782.

WIDOW ELIZABETH ALBINEST VS. YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY.

SYLLABUS.

1. In a suit for damages by the widow of the man killed, the answer of defendant specially denying plaintiff's capacity as widow, denying that she had ever been the dead man's wife, and averring that at the time of her marriage to him he was already married to her knowledge, sufficed to lay the basis for the introduction of proof of a former marriage.
2. The law does not require marriage, like title to real estate, to be proved by documentary evidence. It may be proven by parol. Like other contracts, it may be proved by any species of evidence not prohibited by law, which does not presuppose a higher species of evidence within the power of the party.

Albinest vs. Railroad Company.

3. It appearing by affidavit filed here that a second woman, claiming to be the widow of the deceased, had, subsequent to the judgment herein, instituted suit for damages based on the same cause of action, and had filed with her petition a certificate showing a marriage with her prior in date to the other marriage, the cause will be remanded—it being held that the existence of the two widows to one husband, both claiming damages for his alleged negligent death, is such a vital question of fact as to justify the remanding to enable defendant to implead both in this suit and that they might contradictorily with one another establish which is the widow.

A PPEAL from the Civil District Court, Parish of Orleans—
Ellis, J.

Armand Romain, for Plaintiffs, Appellee.

Hunter C. Leake and *Gustave Lemle* (*J. M. Dickinson*, of Counsel),
for Defendant, Appellant.

The opinion of the court was delivered by

BLANCHARD, J. This is an action *ex delicto* brought by Elizabeth Albinest, alleging herself to be the widow of Joseph Albinest, to recover fifteen thousand dollars damages for the death of the said Joseph Albinest, who was run over and killed by defendant company's passenger train.

The averment is made that his death was brought about solely and entirely by the gross negligence, carelessness and recklessness of the defendant and the particulars are set forth at length.

She represents that the deceased (her husband) was her sole support; that by his death she has been deprived of this support and of his companionship; that she has been reduced to necessitous circumstances and to a condition where she is forced to earn her own living; that she suffered mental sorrow and anguish caused by his horrible death; and that as surviving widow she is entitled to compensation in the sum named.

In response to an exception by defendant that the petition was too vague and indefinite for it to answer, in this, that it is not set forth where and when the complainant was married to Joseph Albinest, the plaintiff filed an amended petition in which she averred her marriage to Joseph Albinest in the City of New Orleans on the 24th of June, 1884.

Whereupon the defendant pleaded the general issue as to the allega-

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tions of the petition, and, by way of special answer, denied that plaintiff was the legal wife of Joseph Albinest. On the contrary, it averred that at the time of the marriage, which she represents took place between herself and the said Joseph Albinest, the latter was a married man to her knowledge, and that the first wife is living and is asserting against defendant the same claim as herein set up by the plaintiff.

Further answering, it charges that the death of Albinest was occasioned by his own fault and negligence, and that he was at the time a trespasser on its tracks.

The case was tried by jury who found for the plaintiff, assessing damages at two thousand dollars, and from a judgment based on this verdict, defendant prosecutes this appeal.

The view we take of the case renders it alike unnecessary and undesirable to enter upon the discussion of that part of it relating to the facts of the catastrophe and the law bearing upon the same, for the purpose of establishing the soundness of whatever opinion the court may entertain of *the right* of recovery on the showing made.

We have found that the cause must be remanded, and, this being so, the court withholds expression of opinion on the merits appertaining to the cause of action itself.

The case must be remanded because evidence entitled to go before the jury, and tendered, was excluded, and because the interests of justice render the remanding advisable.

The evidence excluded related to the *status* of the deceased as a married man *vel non* at the time of the celebration of the nuptial ceremony between himself and the plaintiff herein, and, in this connection, its bearing upon the *status* of the plaintiff as his widow, entitled to bring this action.

As has been seen, she bases her right to recover upon her *widowhood*; that she was at the time of Joseph Albinest's death *his wife*.

Her *status* as such having been specially denied, and being thus put to the proof of it, she established, by proper documentary evidence and by parol testimony, the celebration of a marriage ceremony between herself and Joseph Albinest in June, 1884. And, as giving her the right to sue as widow of the deceased, she proved the opening of the dead man's succession in the Civil District Court of Orleans Parish, and exhibited a judgment therein recognizing her as the widow and placing her in possession of the estate, which consisted, mainly, of the claim herein declared on.

When its turn came to introduce evidence, defendant company offered to prove by parol testimony a marriage of Joseph Albinest prior in date to that with plaintiff, *as alleged in its answer*.

On various grounds, plaintiff's counsel opposed the reception of this evidence.

When the first attempt was made (which occurred on cross-examination of plaintiff herself) to prove a former marriage and the living wife of that marriage, the trial judge ruled that the marriage could only be shown by record testimony, or by showing that there had been such a record and its disappearance, before resorting to parol evidence to establish the facts. He said he thought unless some basis of that character was laid, parol testimony could not be received.

Later, the judge, referring to this first ruling, revised the same in substance as follows:—

That if the marriage alleged by defendant to have been the first marriage was solemnized in any State, the laws of which, like our own, require record evidence, the primary and better proof of the fact of marriage would be that record. In the event of the inability of the defendant to produce it, it would then be competent to prove the solemnization of that first marriage by witnesses present, or by the minister or officer who celebrated it, or by proof of the fact that the deceased and the alleged first wife had lived together as husband and wife and were so recognized by their intimate friends, by the community in which they lived and by each other.

He stated if the defendant were able to produce evidence on such lines he would receive it.

Later, defendant called to the stand the brother of the deceased and tendered him to prove the allegations of the special defense—the fact of prior marriage and the existence of the first wife.

This was objected to on the ground that parol evidence was inadmissible for the purpose; that the testimony was irrelevant; that it was not the best evidence of which the case was susceptible; that if parol, as secondary evidence, be at all admissible to prove a marriage, the destruction or non-existence of the primary evidence must first be established.

This was met by a statement by defendant's counsel that he had been unable to obtain the marriage certificate or documentary evidence showing the first marriage, and he, therefore, tendered parol testimony to prove it.

He stated, further, that his attention was first attracted to the

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duality of the deceased's marital *status* by receiving a letter from plaintiff's counsel claiming her to be his widow and demanding damages for his death, and another from another law firm claiming another woman to be his widow and asserting her right to collect damages; that thereupon he made inquiries and all the information he could obtain was from the brother of the deceased, to the effect that the deceased had gone to Italy on a visit, that he (the brother) had received a letter from him while in Italy stating he would bring a wife back with him and to have things in readiness for her, that he did get things in readiness, and shortly afterwards Joseph Albinest returned with a person whom he introduced as his wife; that they remained together a short while and then parted.

Counsel further stated that for the first time that morning (the morning of the day of the trial) he had ascertained from a sister of the deceased she was present when the first marriage ceremony was solemnized.

The trial judge ruled the evidence not admissible. He thought the special defense of a former marriage set up in the answer was not specific enough; that the name of the supposititious wife should have been given; that plaintiff, whose claim herein is resisted and who was sought to be subjected to the odium of having contracted an adulterous marriage, should have been more fully placed upon her guard; that *laches* was imputable to defendant, etc.

The grounds upon which the exclusion was made appear to be different from those urged by counsel for plaintiff.

After the case reached this court, a motion was made by defendant to remand, mainly upon the ground that since the judgment appealed from was rendered a person alleging herself to be Carmela Albinest, widow of Joseph Albinest, deceased, had instituted suit in the Civil District Court of the Parish of Orleans against this defendant, claiming fifteen thousand dollars damages for the killing of her alleged husband at the time and place and under the circumstances as set forth in the petition of the plaintiff herein.

The motion to remand, supported by affidavit, gives the number of the suit and recites that Carmela Albinest had filed, with her petition, her marriage certificate, showing marriage with Joseph Albinest in the Kingdom of Italy on the 20th of December, 1864—many years prior to the marriage with the plaintiff in the present action.

The representation is made that even if defendant be liable in

damages for the death of Joseph Albines, it should not be called on to pay damages to *two* widows, and that in the interest of justice the case should be remanded in order that both alleged wives may be impleaded in one and the same suit, to establish, contradictorily with one another, which is *the widow*.

Ruling—The answer of defendant specially denying plaintiff's capacity as widow of Joseph Albines, denying that she had ever been his wife, and averring that at the time of her marriage to him he was already married to her knowledge, sufficed to put plaintiff on her guard and to lay the basis for the introduction of proof of a former marriage.

The object of pleading is to notify the adverse party in order that he may be prepared to rebut. He may not, for lack of more explicit pleading, exclude pertinent evidence of whose existence and intended introduction he was previously made aware.

Drullet vs. McMairs, 37 La. Ann. 802.

The law does not require marriage, like title to real estate, to be proved by documentary evidence. It may be proven by parol. Like other contracts, it may be proved by any species of evidence not prohibited by law, which does not presuppose a higher species of evidence within the power of the party. Holmes vs. Holmes, 6 La. 470.

And we are not prepared to say that the evidence tendered by defendant in this case, to prove the former marriage, presupposed a higher species of evidence within his power. Beaulieu vs. Ternoir, 5 La. Ann. 480.

The marriage relied on to defeat plaintiff's claim to be widow of the dead man was contracted in a foreign country many years before. Defendant's knowledge of its existence was derived from what the brother of the deceased had told him. It cannot be said that this presupposed there was higher evidence, than the parol testimony tendered, which was in defendant's power to produce.

Considering the special defense set up in the answer, plaintiff was not taken by surprise when it was sought to prove the fact of a prior marriage by parol. Castagnie vs. Bouliris, 43 La. Ann. 951.

Had the evidence tendered of the former marriage been received and it had been sufficient to establish it to the satisfaction of the jury, and had it also been established to their satisfaction that the plaintiff, prior to contracting marriage with the deceased, had been informed of the first marriage and of the fact that the first wife was still living, their verdict might have been different from what it was.

The question, therefore, as to whether or not Joseph Albinest was a married man at the time of his marriage to the plaintiff, and that she had been anteriorly informed of it, is a vital question of fact, so much so that it warrants, in interest of justice, the remanding of the case. C. P. 906; Barry vs. Pike, 21 La. Ann. 221; Banger vs. City, 34 La. Ann. 202; Nelson vs. Parish, 32 La. Ann. 884; Jackson vs. Illinois Ry. Co., 46 La. Ann. 226.

In the case last cited, which was one where a woman, alleging herself to be the widow of the man killed, sued for damages, and where the answer of the company, as here, specially denied she was his legal wife, this court set aside the verdict of the jury, reversed the judgment and remanded the cause, justifying its action by expressing grave doubts as to the fact of marriage between the plaintiff and the dead man. It was remanded for further evidence on that point.

For the reasons assigned it is ordered, adjudged and decreed that the verdict of the jury herein be set aside, the judgment based thereon annulled, and that this cause be remanded for further proceedings according to the views herein expressed and the law.

It is further ordered, etc., that the costs of this appeal be borne by the appellee.

No. 13,828.

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JAMES WILSON, INDIVIDUALLY AND AS ADMINISTRATOR VS. GEORGE WILSON ET ALS.

SYLLABUS.

1. An administrator, making the heirs parties, has capacity to institute and prosecute a suit for a partition of property owned in indivision by the succession he represents and third persons.
2. The heirs of a predeceased husband and father, who died without debts, are *third persons quoad* the succession of the lately deceased widow and mother which is under administration to pay debts contracted by her individually after the death of the husband.
3. A succession under administration, and unaccepted as yet by the heirs of the deceased, is held and considered a separate entity distinct from *their heirship*, which, until the succession is settled, or their acceptance avowed, is contingent and remote, in the sense that there devolves upon them *as heirs only* the remainder left after payment of the debts.

A PPEAL from the Civil District Court, Parish of Orleans—*Sommerville, J.*

Wilson vs. Wilson et als.

James B. Rosser, Jr., for Plaintiff, Appellant.

Joseph Brewer for Geo. W. Wilson, and Miss Ida Ober, Defendants, Appellees.

Henry Renshaw, Tutor *ad hoc* for Miss Florence Wilson, Defendant, Appellee.

Pierre Adolph Simmons, Jr., Curator *ad hoc* for Thomas Thornwell and Bennett Wilson, Defendants, Appellees.

The opinion of the court was delivered by

BLANCHARD, J. Samuel Wilson died in 1866, possessed of a considerable estate. He left a surviving widow in community and six heirs—the issue of his marriage with Eliza Jane Caldwell (widow aforesaid).

His succession was opened and his will probated. This will named his wife and his eldest son executors. It made the same disposition of his property the law would have made.

There were no debts. Whatever administration there had been of his succession was closed by judgment of the court in July 1873. This judgment recognized his children (all of age) as his heirs and legatees and, as such, entitled to the naked ownership of all property left by him. The judgment also recognized Eliza Jane Caldwell as widow in community and as legatee of the usufruct of the property left by the husband.

Thus, the widow and the heirs owned the property in indivision—the widow in the proportion of one-half; the heirs in the proportion of one-half. But the widow, as usufructuary, enjoyed the benefit of the half pertaining to the heirs.

Matters appear to have continued thus until March, 1900, when Eliza Jane Caldwell, the widow, died. Her death ended her usufructuary rights on the half of the property belonging to the heirs.

At the time she died, her estate consisted of her undivided half of the property which had pertained to her as widow in community at the time of her husband's death, and she owed several thousand dollars of debts incurred since the death of her husband, one of which was a note for \$4,500 secured by mortgage.

She left no will. Her heirs are her children, the issue of her marriage with Samuel Wilson, deceased.

Her succession was opened and James Wilson, her son, was appointed administrator. The inventory and appraisal showed her half of the property to be of the value of about \$23,000.

A provisional account was filed by the administrator showing the debts due by the dead widow, and others incurred in the opening and administration of her succession. The two together exhibited, on the account, a total indebtedness of about \$7,700.

Several of the heirs straightway filed oppositions and the same are as yet undisposed of.

Following the filing of his provisional account, James Wilson instituted the present action. He sues in two capacities—as administrator and as heir.

He avers the debts of the succession which he represents to be as above stated; that he is without funds to pay; that it is necessary to sell property to obtain money for the purpose; that the only property belonging to the succession is that held in indivision between it and the heirs; and that to sell the succession's *undivided* interest in the property would be disastrous to all concerned.

His prayer is for judgment decreeing the partition by licitation of all the property held in common as aforesaid. He gives a detailed description of this property and makes all the heirs parties defendant.

Several of the heirs appear and file consent to judgment as prayed for. Others oppose the proceeding *in toto*.

One of the pleas in defense filed is an exception (1) that the administrator is without right in law to provoke the partition of the property as sought; (2) that the property, the partition of which is asked, being still under administration in the succession of Eliza Jane Caldwell (widow Wilson) and the succession not having yet been liquidated, the property cannot be the object of partition.

This exception was sustained and the suit dismissed. James Wilson, both as administrator and individually, appeals.

So far as James Wilson, in his individual capacity, is concerned, we may eliminate him from the appeal.

It may be that the second branch of the exception is good against the demand he makes *as heir* for the partition of property still under administration in a succession whose debts are not yet paid.

But the whole of the exception, in so far as it is leveled at the administrator's right in law to provoke the partition, is without merit and the ruling of the trial Judge sustaining it was error.

An administrator, making the heirs parties, has capacity to institute and prosecute a suit for a partition of property owned in indivision by the succession he represents and third persons. Here, all the heirs are made parties.

The textual provision of the statutory law, itself, seems to settle this.

Article 1135 of the Civil Code says:

If the deceased was in community or partnership with any one who has survived him, the curator of the vacant succession or of absent heirs is bound, immediately after his appointment, to sue for a partition, in order that the part which belonged to the deceased in the community or partnership property be ascertained.

Applying this provision of law to a state of facts similar to that here presented, this Court held, in the Succession of Dumestre, 42 La. Ann. 411, that

Where the surviving member of a community subsequently dies, leaving *individual* debts unpaid, necessitating an administration, it becomes the duty of the administrator of his succession to institute suit for partition of the property held in indivision by it and third persons; and the heirs of the predeceased partner, dying without debts, are third persons in that sense.

See also Smith vs. Sinnott, 44 La. Ann. 51.

The fact that the heirs of the predeceased partner of the community, Samuel Wilson, are likewise the heirs of his lately deceased widow, Eliza Jane Caldwell, does not make them, *quoad* her succession, any the less strangers to its administration undertaken for the purpose of the settlement of debts she owed, and for which they have not made themselves liable by an acceptance, pure and simple, of her succession. 42 La. Ann. 413.

In other words, her succession under administration, and unaccepted as yet by her heirs, is to be held and considered a separate entity distinct from *their heirship*, which, until the succession is settled, or their acceptance avowed, is contingent and remote, in the sense that there devolves upon them *as heirs* only the remainder left after payment of the debts.

The Succession of Eliza Jane Caldwell, under administration, being owner of an undivided half of the property and the heirs of Samuel Wilson, deceased, the owners of the other undivided half, and it being necessary to reduce to the possession and dominion of the administrator the half belonging to the succession, in order that the same may be administered and applied to the settlement of the debts of the said Eliza Jane Caldwell, the administrator had a standing in court to provoke a partition of the property. It is only by this means that he

can reduce to possession and bring under his administration the share of the property pertaining to the succession.

Having undertaken the administration of an estate burdened with debt

said the court in the Succession of Dumestre, 43 La. Ann. 413,

it was the *first* duty of the administrator to separate the interests of the joint owners, so that he might reduce to possession the portion belonging to the succession under his control.

It may be that the value of the property sought to be sold to affect partition, in order that the share of the succession may be applied to the payment of its debts, is greatly in excess of the indebtedness; it may be that *all* the property held in indivision should not be ordered sold in the partition proceedings; it may be that the administrator can get along with only a partial partition—that is to say, with the partition of part only of the property held in indivision; it may be that good reasons exist why only enough of the property held in indivision, as is necessary to enable the administrator, applying the share of the succession, to pay the debts of the succession, should be partitioned; and it may be, as set up by the defense, that part of the property scheduled for partition may not belong to the succession.

But all these matters and things pertain to *the merits*. It is for the District Judge to pass upon them there, and to award such judgment as may meet the exigencies of the case and be proper and legal under the showing to be made.

But it is not for him to dismiss the suit entirely because of them. They do not strike at the foundation of the right to sue as this administrator has sued. They have, indeed, no relevancy or bearing on the question raised by the exception, which the judge sustained.

It may be, too, that the proceedings to effect the partition of the property should have been taken in the Succession of Eliza Jane (Caldwell) Wilson, and not by separate suit. If so, the trial Judge should have ordered the suit for partition cumulated with the Succession record and proceedings, instead of dismissing it altogether.

It is ordered, adjudged and decreed that the judgment appealed from be avoided and reversed, that the exceptions filed be overruled, and that this cause be proceeded with in the court *a qua* according to the views herein expressed and the law, costs of appeal, and those of the lower court pertaining to the exceptions, be borne by the appellees.

Rehearing refused.

Kaufman vs. Sheriff et als.

No. 14,090.

LOUIS KAUFMAN, AGENT, vs. C. T. CADE, SHERIFF, ET ALS.

SYLLABUS.

Plaintiff claimed \$2,500 as the value of certain property belonging to his principal and seized under an execution against another person. He also claimed various items, in the way of damages, aggregating \$775. On the day upon which the suit was filed the property in question was surrendered to him and he took possession of it without condition or reservation. The amount left in dispute being but \$775, this court is without jurisdiction, and the appeal is dismissed.

A PPEAL from the Nineteenth Judicial District, Parish of Iberia.—
Weeks, Judge, ad hoc.

Andrew Thorpe and Thomas H. Thorpe, for Plaintiff and Appellee.

Waller J. Burke & Bro., for Defendant, Appellant.

The opinion of the court was delivered by

MONROE, J. Certain steel rails, splices and spikes, belonging to Joseph Kaufman, and lying upon the banks of Bayou Teche, in the Parish of Iberia, were seized by the sheriff of the parish, February 14, 1900, under a writ of execution issued against James F. Martin. Upon the 19th of the same month, Louis Kaufman, agent for Joseph Kaufman, claimed the property for his principal, and this was followed some days later by a written communication addressed to the sheriff by counsel representing Louis Kaufman, agent, demanding \$1,882.30 as the value of the property seized, and notifying the sheriff that, in default of payment, legal proceedings would be instituted. The sheriff in the meanwhile called several times on the seizing creditor for a bond of indemnity, but without success, and upon March 3rd this suit was filed. The plaintiff claims \$2,500 as the value of the property, \$250 on account of certain expenses alleged to have been incurred in preparing same for shipment; \$250 as the anticipated profit on a sale which is said to have been defeated by the seizure, and \$275 as the fee of his attorney for the institution of the suit. Upon the same day that the suit was filed the seizure was released and the property, which had not been removed from the place where the sheriff found it, was restored to the plaintiff, who, shortly thereafter, sold it and delivered

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109	125
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Davies et als. vs. Water Works and Light Company et als.

it to the purchaser. A month later citation in this suit was served; the sheriff answered; the case was tried, and plaintiff's demand was rejected at his cost.

And from the judgment so rendered he has appealed. It is evident that, after deducting the \$2,500 represented by the property which the plaintiff has accepted, without condition, so far as we are informed, the amount left in dispute is not within the appellate jurisdiction of this court.

Succession of Foster, 51 Ann. 1680; Zacharie vs. Lyons, 22 Ann. 218; Stubbs vs. McGuire, 33 Ann. 1069.

The appeal is therefore dismissed.

BEAUX, J., takes no part.

No. 14,001.

R. D. DAVIES ET ALS. VS. MONROE WATER WORKS AND LIGHT COMPANY,
ET ALS.

SYLLABUS.

ON MOTION TO DISMISS.

1. In case of doubt, the doubt will revolve itself in favor of the appeal. The sufficiency and competency of the surety was a proper subject for inquiry in the District Court.
2. The return of appeals in matter relating to the appointment of receivers, under Statute 1898, is governed by special provision of that statute.
3. The lack of an affidavit to show interest of the appellant affords no ground to dismiss the appeal where the interest is admitted by all the parties to the appeal.

ON THE MERITS.

The management of the company brought it within the terms of the Statute 159 of 1898. A receiver was appointed by the District Court, and the court's action in this respect is affirmed, subject to the rights of creditors under Section 10 of Statute 159 of 1898.

ON APPLICATION FOR REHEARING.

1. It is good ground for the appointment of a receiver to a corporation when it appears that the directors or other officials are jeopardising the rights of stockholders or creditors, by grossly mismanaging the business, or by committing acts *ultra vires*, or by wasting, misusing or misapplying the property or funds of the corporation; or, when it appears that a

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majority of the shareholders are violating the charter rights of the minority and putting their interests in imminent danger.

2. It is for the court to determine whether or not the showing made justifies and makes advisable the appointment of a receiver.
3. The appropriate place for officials in charge of the business of a corporation is the domicile of the company. If they live away from its domicile, they have no right to charge the company for traveling expenses to and fro between their homes and the domicile of the company.
4. Officials and majority shareholders have no right to extend favors to certain of the shareholders at the expense of the corporation, or of the body of the shareholders.
5. The provision of the charter requiring *thirty* days' previous notice to be given to stockholders of a meeting called to consider the question of the dissolution and liquidation of the corporation is held to be mandatory.
6. It will not do to say that because a corporation may be insolvent and nothing be eventually coming to the stockholders, they are without interest to take action to prevent abuses.
7. Where a case for a receivership is otherwise made out, it is no sufficient ground for denying the application that it will entail large costs and expenses. The courts of Louisiana will not permit the spoliation of estates and corporations in the way of the allowance of exorbitant charges for commissions, fees, costs, etc.

A PPEAL from the Sixth Judicial District, Parish of Ouachita.—
Hall, J.

Andrew Augustus Gunby and E. Tylor Lamkin, for Plaintiff, Appellee.

Hudson, Potts & Bernstein, for Defendants, and Intervenors, Appellants.

The opinion of the court was delivered by **BREAUX, J.**

On rehearing by **BLANCHARD, J.**

ON MOTION TO DISMISS.

BREAUX, J. Plaintiffs and appellees moved before this court to dismiss the appeal on a number of grounds.

First, because no appeal bond has been filed as required. The two documents purporting to be appeal bonds filed by the defendants, the Monroe Water Works and Light Co. *et als.*, are signed by L. D. McLain who is one of the defendants and appellants.

Second, because the defendants' and intervenors' order of appeal is made returnable before the expiration of fifteen days from the date of the judgment, in contravention of Statute 92 of July 10th, 1900, which declares that the judge shall fix the day in the order granting the appeal, which shall not be less than fifteen days nor more than sixty days from the date of the order, except by the consent of the parties.

Third, because appellants have not complied with the provisions of Section 4 of Statute 159 of 1898, which requires that one appealing from an order appointing a receiver shall make affidavit to his interest in such appointment.

With reference to the facts bearing on the first ground for dismissal, it does appear that L. D. McLain is a party defendant and a party intervenor. The intervention, as it appears on the face of the judgment appealed against, was dismissed. With reference to the facts bearing on the second ground for dismissal, the orders of appeal were made returnable according to law. And, with reference to the facts upon which the third ground is based, no affidavit was taken by any one applying to this court.

Taking the first ground for decision, the court finds that there are a number of decisions in which it is held that questions relating to the sufficiency of the bond and the competency of the surety on the bond, both as relates to identification and competency, should be decided contradictorily before the court *a qua*. In view of the fact that questions should be decided in favor of sustaining the appeal where there is the least doubt, the court decides to adhere to the ruling as laid down in the following cases: Edwards vs. Edwards, 29 An. 599; Succession of Charmbury, 34, A. 21; Surget vs. Stanton, 10 A. 318; Wood vs. Harrell, 14, A. 61; Vredenburgh vs. Behan, 32 A. 475, and not to consider the construction in Barrow vs. Clack, 45 A. 478, as applying. This disposes of the first ground to dismiss.

As relates to the intervenors, no question for dismissal arises on this point. An appeal bond was furnished by the intervenors, not objectionable in any way.

As relates to the second ground of the motion to dismiss, that is, that the return day should have been fixed by the court, under the Statute of 1898, we can only say that the Statute of 1900 relating to

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appeals generally controls in all cases not governed by special rule. A general law does not repeal a special statute, unless its terms are such as to make it appear evident that the intention was to repeal the special statute. Repeal by implication is not presumed.

As relates to the intervenors, they have furnished an appeal bond to which not the least objection has been urged.

With reference to the next objection made to the appeal in the motion to dismiss, the lack of the affidavit affords good ground for dismissing the appeal, appellees urge. The Statute 159 of 1898 provides that one who, by affidavit, appears to be interested, may appeal by furnishing bond as required. We think persons not parties to the proceedings are referred to and not those who are parties to the suit, whose interests are admitted by all parties to the litigation. The purpose in requiring the affidavit is to compel the appellant to swear that he, though not a party, has interests involved which afford him a right to be heard. The affidavit of one whose interest is admitted would be an entirely useless formality, as it would add nothing to that which has already been ascertained.

For these reasons, the motion to dismiss the appeal is denied.

ON THE MERITS.

Plaintiffs seek to have a receiver appointed to take charge of the defendant company. The defendant company was organized in 1892 for the purpose of building and operating water works and electric lights in the City of Monroe, and since that year they have been operated by that company. Stock was issued based on the asserted value of the franchise granted by the City Council of Monroe to construct and operate a system of water works and electric lights for the term of thirty years. The capital stock of the company was fixed at one hundred and twenty-five thousand dollars. No amount having been paid by the stockholders, it became necessary to issue bonds secured by mortgage on the plant, in favor of the Manhattan Trust Co., of New York, trustee for the holders of the bonds. They bear six per cent. interest and are payable in thirty years from their date.

These bonds were sold, and the amount they brought, less discount and commission, was used in paying for the defendant company's water works and electric light plant.

The Board of Directors, elected at a meeting of a majority of the stockholders, consisted of three members. In January, 1893, W. E. Hawks and Samuel B. Hawks, being a quorum of the Board of Directors, met and elected the former as president and the latter as secretary. Irving E. Gibson was elected vice-president. At this meeting it was voted that the Manhattan Trust Company of New York deliver to W. E. Hawks the issue of one hundred thousand dollars, to which we have before referred. It was also voted by these two members at this meeting to pay to the President and Treasurer a salary of two thousand dollars per annum, and all expenses incurred while acting in his official capacity. The following May a majority of the stockholders met at the office of the company to elect a board of directors for the year. The same directors were re-elected and they re-elected the same officers. A resolution was adopted at this meeting of the stockholders ratifying every action taken by the directors, W. E. Hawks and S. B. Hawks, at the meeting held by the directors, to which we have just referred. In November, 1896, at a special meeting of the Board of Directors the President said that during the past three years it became necessary to make extensive improvements, additions, and extensions to the plant at a cost exceeding the revenues; that the floating debt of the company, in consequence, amounted to the sum of sixty thousand three hundred and fifty 45-100 dollars. He, it is stated in the minutes of the meeting, presented an itemized statement and account of the company's expenditures, which was discussed, and the amount approved, and measures were taken to liquidate the debt.

A large majority of the stockholders met, after notice to interested parties. It was voted to approve and ratify the action of the Board of Directors in having authorized the President to issue bonds to an amount not exceeding one hundred thousand dollars, maturing in thirty years, secured by a second mortgage on the company's property. This was the second issue of bonds. We understand that the bonds were issued and negotiated. The selling price of the bonds, as ordered by the Board of Directors, was to be not less than eighty cents on the dollar.

In the year 1900, at a meeting of the Board of Directors, the advisability of selling the plant was discussed and resolutions adopted to that end. The year following the subject of selling was again taken up, and the price and the terms of sale were agreed upon, with the town of Monroe, which was to become the vendee of the defendant

company. Commissioners were appointed and other steps taken looking to a final liquidation of the company's affairs.

The same day that this meeting was held, and before it was held, plaintiffs' injunction was duly served, enjoining the company from selling the property as proposed. Among the grounds of complaint urged by plaintiffs they specially charge that the President has mismanaged the affairs of the company, and that he has neglected the plant; that he has misapplied the funds, and that he has made no statement of the business; that he has kept the books of the company at his home, in a distant State, and was conducting the affairs of the company there; that he has committed a number of acts *ultra* the charter, and that their interests as a minority of the stockholders are in imminent danger.

Defendants and intervenors controvert the allegations of plaintiffs' petition and aver that the management of the President and other officers was proper and affords no ground for criticism; that the sale proposed was in the interest of all concerned; that the sole idea was to liquidate the affairs of the company in the manner provided in the charter, and pay the debts; and that the city caused the plant to be appraised by an expert engineer and offered eight thousand dollars more than the value fixed by the expert.

The Judge of the District Court annulled all the proceedings of the stockholders and directors held on April 1st, 1901, looking to the sale of the property and at which commissioners were elected. He appointed a receiver to take charge of the property and business of the company, and directed the receiver to hold, administer, and operate the plant for the benefit of the creditors and stockholders. He dismissed the intervention in question. It is from this judgment that the intervenors appeal.

Plaintiffs have arraigned the management of the company from the beginning of the term of office of the President, in 1893, to date. The salary of the President, and the amounts expended by him, for which he charged the company, although he was at his own home and not rendering service to the corporation at its domicile, are grounds for plaintiffs' attack.

The salary of the absent President, on the one hand, for his services, though an absentee, were surely ample enough. The indebtedness increasing annually suggests that there were no net revenues. The

President had just such control as he chose to have. Each stockholder, however limited may have been his interest, had the right to look to him for favorable results. Meeting with disappointment in this respect, it created some dissatisfaction on the part of plaintiffs, who now not only complain of the salary charged, but stoutly criticise the President for charging lump sums for traveling and other expenses incurred, he avers, in the interest of the company.

Among the items of charges are amounts for traveling and other expenses from his northern home to Monroe once a year to remain only a few weeks, although, in view of the salary, he owed careful supervision and personal attention for at least the greater portion of his time.

The President, from all appearances, controlled or owned the first of the issues of bonds made by the company. We infer that he was its creditor for a large amount. There was no progressive decrease of the indebtedness. The interest and the capital remained unchanged until 1896. In that year an issue of bonds as large as the first was voted by the Board of Directors and approved at the meeting of the stockholders. True, under the charter of the company, the Board of Directors, with the approval of the stockholders, had the authority to issue bonds. This authority we do not understand plaintiffs to question, but the amount of the issue is the cause of plaintiffs' complaint.

Plaintiffs also inveigh against the President's management on the ground that he has neglected to keep up the plant; that in consequence of the neglect of the works it has greatly decreased in value. The testimony on this point is conflicting, yet it must be concluded that the machinery and other property of the company was not in a first-class condition. The testimony of an expert who had closely inspected the plant sets forth that part of the works was not in good order or condition.

Plaintiffs also charge that there was a neglect in supplying water and light, and that in consequence the consumers were considerably fewer in number than they would have been had the service been better.

Plaintiffs call attention to the fact that although the bonded indebtedness amounts to two hundred thousand dollars, yet it was proposed to sell the whole plant for about seventy-five thousand dollars.

An agreement was entered into about the year 1892, between the defendant company and the City of Monroe, by which the latter secured an option to become the owner of the plant at its value to be ascertained

in the manner set forth in the agreement. The time fixed for the exercise of this option is not far distant. It is said that the City of Monroe is taking steps looking forward to availing itself of this option. Besides, a statute of the State grants power to municipalities to expropriate property such as that owned by the defendant company. Plaintiffs urge that the statute is not one that can possibly confer a right of expropriation, as, it contends, defendants have acquired a vested right. None the less, defendants are apprehensive that there will be expensive litigation, which they desire to avoid and to the possibility of which they point as a reason for justifying the sale. Be this as it will, we will not anticipate issues which, perhaps, in the interest of all concerned, will be avoided. To our minds, a point has been reached rendering it necessary to change the present situation.

Whether the settlement should be made in accordance with the terms of the charter by the commissioner and the President, or the settlement and liquidation should be conducted by a receiver, gives rise to questions not free from difficulty in the solving. We are confronted by a condition, we think, recognizing the rights of the one or the other to act. We understand that the receiver is virtually in charge. In view of this fact and for the reason that, under proper and economical administration of its affairs by the receiver, and none other should be contemplated, and we have no reason to infer that any other is in contemplation, justice will be done to all the claims. The day of receiver's extravagance and of ill-advised steps in liquidating property in their charge is of the past. We believe that the spirit of the law requires the utmost circumspection and care on the part of all those placed in the management of business which is, we may say, placed directly under the eye of the court.

We take it that no one will dispute the proposition that property of a corporation is not to remain in the hands of a receiver after there is no reasonable ground to believe that the property of the corporation cannot be so administered as to pay its debts. Sec. 10 of Statute 159 of 1898. This section is imperative in its terms and is not to be defeated by injunction or other proceedings instituted to place the property in the hands of a receiver or to enjoin a contemplated sale. In other words, the administration must be temporary, if, at the instance of creditors, the case is brought within the terms of the section of the cited statute.

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The shareholders, however their interests may be limited, are entitled to an accounting, and that is about the extent of the possibility of the judgment appealed from, should it be made to appear that the property should be disposed of and a final settlement made. To ascertain this, the order of sale of the property and the distribution of the assets cannot give rise to damaging expense.

For reasons assigned, the judgment appealed from is affirmed at appellants' costs.

PROVOSTY, J., dissents from the judgment on the merits.

ON APPLICATION FOR REHEARING.

BLANCHARD, J. Plaintiffs—thirteen in number—are minority shareholders in the defendant company, and their holdings aggregate 159 shares out of a total of 1,250 shares. The shares are each of the par value of \$100.00.

It appears that when the corporation was chartered and the shares subscribed for, not a dollar of the subscription was paid in cash at that time, nor at any subsequent time, and no notes or other evidences of debt for amounts subscribed were taken. In a word, none of the subscriptions were ever paid, nor was it ever contemplated, it would seem, that they should be paid. This is not the way to launch corporations upon the business world in the State of Louisiana, nor was it at the time this company was organized. This is said, merely, in passing.

The application for the appointment of a receiver is based on Act No. 159 of 1898, and the parts of the act immediately pointed to as authorizing the action taken are paragraphs 2 and 11 of Section 1.

The first is to the effect that the court may, at the instance of any stockholder or creditor, appoint a receiver to take charge of the property and business of a corporation when the directors or other officers of the corporation are jeopardizing the rights of stockholders, or creditors, by grossly mismanaging the business, or by committing acts *ultra vires*, or by wasting, misusing, or misapplying the property or funds of the corporation; and the second is to the effect that a receiver may be appointed at the instance of any stockholder when a majority of the stockholders are violating the charter rights of the minority and putting their interests in imminent danger.

The question presented is whether or not a case is made out, under these provisions of the law, justifying and making advisable the appointment of a receiver.

The District Judge held there had been. Our conclusion on the first hearing was the same, and on this second hearing and consideration we are constrained to confirm it.

The corporation was chartered in 1892; its domicile was Monroe, Louisiana; its business to supply water service and electric lights to the town and the inhabitants thereof.

Bright & Gravely were awarded the contract to supply the materials and construct the works. This they agreed to do for one hundred thousand dollars, for which first mortgage gold bonds, running thirty years with 6 per cent. per annum interest, were to be issued by the company and delivered to them.

They enlisted William E. Hawks of Bennington, Vermont, in the enterprise, and through his aid the works were constructed. The bonds were issued and turned over to Hawks, together with a large majority of the stock.

In fact, Hawks, his son, and a few associates, to whom were transferred some shares of stock, became the Water Works and Light Company, supplanting the original incorporators and holders of stock, with the exception of plaintiffs herein, who, as we have seen, hold only 159 shares of the 1,250 issued.

Hawks became President and Treasurer of the Company; his son Secretary, and these, together with one other, chosen by Hawks, constituted the Board of Directors.

The affairs of the corporation have thus been under the sole control and management of Hawks from about the year 1893 down to the present time.

He, too, was its creditor, for the mortgage bonds that had been issued and from the proceeds of which the works had been constructed, had passed into his hands.

We find that beginning, when Hawks took charge in 1893, with this indebtedness of one hundred thousand dollars of bonds, the liabilities of the corporation had so increased that when the present proceeding was initiated in April 1901, they aggregated, according to the figuring of Mr. Hawks, more than \$229,000.00.

This represented the first mortgage bonds (\$100,000), a second series of bonds, known as the second mortgage bonds, for the same amount,

which he had caused to be issued, and which he had absorbed in payment of a floating indebtedness incurred under his administration and due to him, and the remainder represented a still further floating indebtedness outstanding against the corporation and likewise due to Hawks.

No sufficient enlargement of the plant or extension of its scope appears to have been made in the eight or nine years of Hawks' administration to justify this more than doubling of the indebtedness with which the concern started out.

Neither does it appear that extensive repairs or betterments are responsible for the large increase, for it is shown by the evidence that the works had not been maintained at a high standard of efficiency, that their condition when the case was tried was by no means what it should have been, and that a competent expert employed for the purpose of examination and report had estimated the deterioration to be as great as 33 1-3 per cent.

Nor was it necessary to increase the indebtedness to meet the running expenses of the plant. It was more than self-sustaining. Its annual revenues exceeded its annual expenses. The receipts are shown to have averaged about \$20,000.00 a year from 1896 to the time of the filing of this suit, and during all the years Hawks controlled the corporation its revenues from water and light rentals and dues aggregated about \$140,000.00.

Our examination of the charges found upon the books of the corporation kept by Hawks, and going to make up the large increase of indebtedness referred to, has satisfied us that much of the same would not stand the test of judicial scrutiny were it applied.

For instance, while the domicile of the company is fixed in its charter at Monroe, there are found upon its account many items for traveling expenses from his home in Vermont to Monroe to attend to the business of the corporation and to participate in the meetings of its stockholders and directors.

The same is true of his son, who was a director and the secretary of the company. His traveling expenses from Vermont to Monroe through eight or nine years are likewise entered up as legitimate charges against the company. These items aggregate a large sum.

The father was on the rolls as a paid official, to whom a salary of \$2000.00 a year as President and Treasurer was voted. This salary was fixed to be paid him at a meeting of the Board of Directors held in Ben-

nington, Vermont, at which only the father and son were present. The minutes of that meeting are dated at Monroe, but it is shown that the meeting itself was held in Vermont.

If the father and son lived in Vermont for their convenience, their traveling expenses to the place of domicile of the Company, to attend stockholders' and directors' meetings and to look after the affairs of the Company, were not legitimate charges against the corporation. The appropriate place for officials in charge of the business of a corporation is the domicile of the Company. If they live away from its domicile they have no right to charge the Company for traveling expenses to and fro.

There are other items of expense on the account against the Company, such as overcharges of discount, interest, expenses relating to services rendered by Hawks to Bright & Gravely, etc., which go unduly to swell its aggregate.

The charter provides that the office of Treasurer shall be combined with that of Secretary. Yet William E. Hawks caused himself to be elected as President and Treasurer. He blended in himself the two offices, whereas the direction of the charter is otherwise.

The Treasurer's office was in Vermont, and his books were kept there. So, also, the stock books of the corporation and the seal of the Company were kept there. And it is reasonably certain that the funds of the Company, or a large part thereof, were kept in Vermont. Bills were sent on for inspection and payment there.

These are objectionable features in the conduct of the business of this corporation.

The charter provides that directors shall be chosen from among the stockholders. Yet it appears that in 1893 S. B. Hawks and I. E. Gibson were elected directors before they had become shareholders, and, afterwards, they were made eligible by the transfer to them by William E. Hawks of a share of stock each, which transfer was ante-dated by his direction.

But before their eligibility was thus assured, one or more meetings of the Board of Directors had been held whereat important business of the corporation had been transacted.

Subsequently, at a stockholders' meeting held at the domicile of the Company, in May 1893, prior acts of the Board of Directors were, in general terms, approved and ratified, and this is pointed to by defendants as curing anterior irregularities. But the testimony of W. A. Bright, one of plaintiffs, and the only one of the plaintiffs present at

the ratifying meeting, shows that the minutes of the previous action, referred to as ratified, were not read to the meeting, nor was it explained what that action was.

These are matters, however, of small moment, particularly so because they relate back to a period as remote in the affairs of this corporation as 1893.

We find that continuously through the years that Hawks has controlled the corporation, down to the present time, certain shareholders, acting with and for him, have been the recipients of favors from the Company in the way of water service and electric lights free of compensation. No charges were made against them; no bills presented; no payments demanded. They were apparently on the free list. Dues for service so rendered gratuitously would amount to a large sum in the aggregate. Plaintiffs knew nothing of this.

It was a discrimination, against which they may justly complain. Officials and majority stockholders have no right to extend favors to certain of the shareholders at the expense of the corporation, or of the body of the stockholders.

In November 1896 the Board of Directors authorized the issuance by the Company of one hundred thousand dollars of second mortgage bonds. It was explained by the President that a floating indebtedness of over \$63,000.00 existed which should be liquidated. It is not made clear what part of this indebtedness, if any, was incurred for improvements, additions, or extensions of the plant.

The President, William E. Hawks, was authorized to sell a sufficient amount of the bonds to settle the floating indebtedness at a price not less than eighty cents on the dollar. It seems he disposed of them all and is now the holder of the bonds and the creditor of the Company for the full amount thereof.

The same day the directors' meeting, which authorized this issue of bonds, was held, a meeting of stockholders was also held. Four stockholders only were present. They were Hawks, his son, and two others acting with and for him—the four representing 984 shares out of the 1250. None of the plaintiffs were present, and the only notice of the meeting which appears to have been given was ten days' publication in a newspaper in Monroe.

This meeting ratified the action of the directors in authorizing the issuance of the \$100,000.00 second mortgage bonds.

Plaintiffs contend that this action of the majority shareholders was *ultra vires*; that the charter of the Company must be construed with reference to the laws in force when it was adopted; and that at that time Act No. 80 of 1890, and other statutes in force, limited the issuance of bonds by waterworks and light companies to purposes of construction, repair, or acquisitions of property, or franchises.

They also contend that when the bonds were authorized to be issued nothing was due for construction, repairs or acquisitions of property, and that no part of the floating debt then due had been contracted for such purposes.

It is not our purpose to here pass definitely on these contentions. Whatever rights the holders of these bonds may have under the law is reserved to them. But we do say that the suggestion of their *ultra vires* character comes with a force sufficient, united with the other circumstances herein set forth, to justify the receivership sought.

In September 1900, a meeting of the Board of Directors was held whereat a resolution was adopted authorizing the President and Secretary to sell and convey to a New Jersey corporation, known as the Monroe Water Works & Light Company of Jersey City, New Jersey, the entire plant, works, franchises and everything pertaining to the Monroe Water Works and Light Company of Monroe, Louisiana.

On the same day a meeting of stockholders was held. This meeting assembled pursuant to fifteen days' notice published in newspapers in Monroe. The notice announced the meeting was called to consider the question of selling the plant and property of the Company.

The only shareholders present in person were Hawks and his son, and two others acting with and for them. There was present by proxy, held by Hawks, three others whose holdings of stock aggregated 67½ shares. These also were in the Hawks interest.

Twenty-one other shareholders, aggregating 236 shares, were not present and no notice, other than newspaper publication, was given them.

This meeting ratified the action of the directors ordering the sale of the property to the New Jersey corporation.

This New Jersey corporation had been organized by Hawks and his friends for the purpose of absorbing the Louisiana corporation. It was really Hawks and his friends, organized into a foreign corporation, proposing to buy from Hawks and his friends, organized and holding property as a Louisiana corporation.

It is explained in the evidence, on behalf of defendants, that the purpose of accepting the proposition of the New Jersey Company was to change the domicile of the Louisiana corporation in order that, in case of legal proceedings, which were apprehended, taken by the City of Monroe to expropriate the plant and works, the jurisdiction of the Federal Courts in Louisiana could be invoked and longer delays in reaching final results could thereby be had than was considered possible in the State Courts.

But whatever the purpose, the facts substantiate the averments of plaintiffs' petition that defendants were seeking to remove the assets of the Company beyond the jurisdiction of the State courts.

Besides, it will be noted that the public newspaper notice of the meeting of stockholders, called to authorize this sale to the New Jersey corporation, stated the question to be considered was the selling of the plant and property of the Company. This meant, of course, the dissolution of the Louisiana corporation in the event of the sale to the New Jersey corporation.

Yet the eighth article of the charter of defendant Company expressly provides that the act of incorporation may be dissolved by the assent of three-fourths of the stock represented at a general meeting of the stockholders convened for that purpose *after thirty days' prior notice of such meeting shall have been given by the Secretary and Treasurer by mail to each shareholder.*

The meeting referred to was held after fifteen days' notice only, and that, too, published only in newspapers. There was no mailing of notices to the stockholders.

This was a palpable violation of the charter rights of the minority stockholders and a putting of their interests in imminent danger—grounds for the appointment of a receiver by the very letter of the Act of 1898.

Some six months following the meeting held as aforesaid, at which it was resolved to sell out to the New Jersey corporation, another meeting of stockholders was called.

Notice was given of this meeting by publication for thirteen or fourteen days in a newspaper at Monroe. This notice recited that the meeting was called "for the purpose of considering the sale of the water works and light plant and property of the Company to the City of Monroe, and dissolving the company and liquidating its business and affairs." Notice of the meeting appears also to have been mailed to

each stockholder, and these notices to the shareholders recited that the action to be taken meant the dissolution and liquidation of the corporation.

The meeting took place April 1, 1901. There were present in person William E. Hawks, his son, and the two parties who were acting with them. There were present by proxy held by the Hawks three other shareholders who represented between them $67 \frac{1}{2}$ shares. The number of shares represented in person and by proxy was 1014. Twenty-one shareholders, aggregating 236 shares, were not present. All of the plaintiffs herein were of those not present.

At this meeting resolutions were adopted for the sale to the City of Monroe of all the plant, works and property, real and personal, rights and franchises, including a claim of the Company against the City of Monroe for lights and water furnished the city, for the aggregate sum of \$75,000.00. Three liquidators were appointed to wind up the affairs of the corporation, who, with the President, were authorized to make conveyance of the property to the City of Monroe.

On the same day a meeting of the Board of Directors was held and a resolution was adopted by that body ratifying and endorsing the sale, as proposed by the stockholders, to the City of Monroe.

It will be observed that this meeting of stockholders and directors took direct action not only to sell out the corporation and all its property and rights to the City of Monroe, but also for its dissolution and liquidation. It will also be observed that it was proposed to do this after less than fifteen days notice of the meeting given to stockholders.

Yet Articles 7 and 8 of the charter distinctly require thirty days prior notice of a meeting for such purpose, to be given each shareholder through the mails.

These provisions of the charter are mandatory, and for the holders of the majority stock to attempt to sell out the corporation, dissolve and liquidate it in disregard of the same, was a usurpation of authority, and an infringement of the rights of the minority shareholders.

Besides, the minority stockholders, plaintiffs herein, complain at the price at which it was proposed to sell to the City of Monroe, and point to an estimate of the value of the plant, works, etc., made by an expert employed by the President of the Company, and brought from New York for the purpose a short time before, which estimate was very largely in excess of the sum offered by the City of Monroe.

We are not deciding that the price at which the City of Monroe proposed to buy the works is an adequate one. It may be it is the full value of the same. But after the estimate made as aforesaid plaintiffs are not without grounds for questioning the action of the holders of the majority stock.

Especially is this so when according to defendant's contention the plant and works of the Company have cost over two hundred thousand dollars—two issues of mortgage bonds of one hundred thousand dollars each, besides an outstanding floating indebtedness now due of over \$25,000.00; and they further contend that the works and plant have been all the time maintained in a good state of repair and preservation, and not allowed to waste, or deteriorate, or decay.

On the whole, we think abundant justification is found in this record for the action of the trial judge in appointing a receiver. Indeed, we agree with him that the situation, from the standpoint of advisability and even necessity, required this action. It was a prudent and conservative step to take.

It will not do to say that because a corporation may be insolvent and nothing be eventually coming to the stockholders, they are without interest to take action to prevent abuses. Such a doctrine would permit the holders of the majority stock to wreck a corporation and, when the holders of the minority stock ask the court to intervene, to forestall the action of the court by proclaiming the insolvency of the company and the consequent lack of interest in the outcome on part of those seeking the court's action.

Defendants contend for the right of stockholders to dissolve and liquidate the corporation pursuant to the direction of the charter, and urge that this right should not be defeated by the appointment of a receiver.

True, the charter does provide how the corporation may be dissolved and, upon its dissolution, in what way its affairs shall be liquidated.

But this corporation has never been legally dissolved and no appointment of liquidators has as yet been legally made.

Meanwhile, the application for the appointment of a receiver finds, as we have seen, justification.

For the present, at least, this company and its affairs will be safer in the hands of a receiver than it can be in the hands of those who have dealt with it in the manner as herein pointed out.

It may be that the stockholders, or the holders of three-fourths of the stock, represented at a general meeting called for the purpose, pursuant to Article 8 of the charter, may dissolve the corporation and appoint liquidators as provided in Article 7 of the charter, and it may be that after such dissolution shall have been legally accomplished and after the due appointment of such liquidators shall have been made, they (the liquidators) may apply to the court and on proper showing made ask the termination of the receivership and the turning over to them of the property and affairs of the corporation for liquidation and final settlement.

It may be that the court, on this application, and first securing the safety of creditors and shareholders by the exaction of adequate bond, might be authorized to grant such an application, end the receivership and put the liquidators in charge.

The rights of all parties in respect to these matters are reserved.

It is urged as grounds for not granting the receivership applied for that it will entail large costs and expenses to come out of an insolvent corporation, to the detriment of creditors and all concerned, except the receiver and his attorneys and the recipients of court costs.

The State Courts of Louisiana will not permit the spoliation of estates and corporations in the way of the allowance of exorbitant charges for commissions, fees, costs, etc. Nor is it believed that, in the present case, there is any purpose or design on the part of any one to attempt this.

Rehearing refused.

No. 13,855.

STATE OF LOUISIANA EX REL. JOSEPH A. MCCABE VS. POLICE BOARD OF
THE CITY OF NEW ORLEANS.

SYLLABUS.

1. The court will refuse a *mandamus* where there has been an unreasonable delay in applying for it.
2. In the absence of special circumstances excusing the tardiness, twelve months, less a few days, will be held to be such unreasonable delay. In the case of a police captain who has been dismissed from the force after trial and conviction for one of the offenses specified by law as cause for dis-

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108 388
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110 379
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113 429

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107 162
119 518

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122 1094

State ex rel. McCabe vs. Police Board.

missal, and who is applying to the courts for reinstatement, because of alleged nullities in the trial and conviction.

3. Especially will this rule be enforced in a case where the applicant for *mandamus* has neglected to avail himself of his ordinary legal remedy of application for a new trial; and where the granting of the writ would bring disturbance to the finances of one of the branches of the public service.

A PPEAL from the Civil District Court, Parish of Orleans.—
Theard, J.

E. Howard McCaleb, for Relator, Appellant.

Samuel L. Gilmore, City Attorney, and *Arthur McGuirk*, Assistant City Attorney, for Respondent, Appellee.

The opinion of the court was delivered by

PROVOSTY, J. The relator was a captain on the police force of the City of New Orleans. He was tried by the Board of Police Commissioners, the respondent herein, on the charge of "conduct unbecoming," and dismissed from the force. This was on the 18th day of October, 1899. On the 3rd of October, 1900, one year less fifteen days after his dismissal, he presented to the respondent Board an application for a new trial. This application was refused, on the ground that it came too late under the rules of the Board. On the 9th of October, 1900, one year less six days after his dismissal, he filed the instant proceeding, which is an application for writs of *certiorari* and *mandamus* to the respondent Board for his reinstatement.

The trial and the dismissal took place at one sitting of the Board. At the close of the hearing, as a continuous proceeding, one of the commissioners moved that the relator be dismissed from the force, and the motion carried unanimously. Relator contends that this was not an adjudication of guilt, or conviction; and that the dismissal is not based, as required by law, on a conviction.

Relator could be dismissed legally only after conviction of one or more of certain specified offenses, one of which was "conduct unbecoming an officer." He was tried for "conduct unbecoming." He claims

that he was not tried for any one of the specified offenses for which he could be dismissed.

On his trial relator was not represented by counsel. He did not ask to be permitted to have counsel, nor did he object to going to trial without counsel; but the rules of the respondent Board provided, as follows: "The accused will be allowed to conduct his own case and examine and cross-examine witnesses." Relator claims that he was denied the right to be represented by counsel.

The superintendent of police and the chief of detectives were present at the trial, and without being called to the witness stand, and without being sworn, were interrogated. They were not regular witnesses, of whom ten were examined for the prosecution, and their statements could not have been very material, and nothing shows that the interrogatories were not as much in favor of relator as against him; although the inference is that they were against him. Relator claims that he was tried on unsworn testimony.

In the course of the trial relator was asked questions, and he answered them without objection. He claims that he was compelled to testify against himself, and that the trial was a criminal proceeding.

By way of return to the alternative writs, the respondent Board made a full and detailed statement of the entire proceeding against relator, annexing the record of the proceedings and all the documents in the case, and urging various defenses.

The first thing that attracts our attention in the case is the unwarrantable delay of the relator in filing these proceedings, or in applying to the respondent Board for a new trial. Without apparent reason, unless it was that he acquiesced in the dismissal, he permitted the delay for new trial to go by, and permitted one year to elapse without taking any steps to have himself reinstated, or to prevent the respondent Board from filling the vacancy, or supposed vacancy, caused by his dismissal, or even to warn the respondent Board against filling said vacancy. The neglect of relator to avail himself of his ordinary legal remedy of new trial, might itself be held to be fatal to the present application for *mandamus* (High, Ex. Legal Rem., 2 Ed., p. 22); but we prefer to rest our decision on the broader ground, that the relator, if he contemplated the present proceeding, should at least have warned the respondent Board against filling the vacancy, and should not have waited so long before instituting the present proceeding.

"The right to be reinstated may be lost by laches or unreasonable delay in making application for the writ." Am. and Eng. Ency. of Law, 2nd Ed., Vol. 19, p. 774.

In one of the cases cited in the note to the above, *People vs. Justices*, 78 Hun. (N. Y.), 334, a court officer removed without cause was denied the writ, because he had waited eight months before applying for it. Said the court: "If the relator claimed that he had been unjustly removed, it was his duty to proceed with diligence, in order that the respondents might have been advised of the claims advanced."

In the case of *State ex rel. Evershed vs. Judges*, 47 Ann. 180, this court said: "This court will not, by writ of *mandamus* or *certiorari*, review orders or decrees of the lower court made months before any application here."

The following statement of the law on this subject we find to be well supported by authority, viz:

"Laches or delay in making application for the writ, although not an absolute bar, may in the discretion of the court afford sufficient ground for its denial. In determining what will constitute such unreasonable delay or laches as will defeat the right to a *mandamus*, regard should be had to the circumstances justifying the delay, to the nature of the case, the relief demanded, and the question whether the right of the defendant or other persons have been prejudiced by the delay." Am. and Eng. Ency. of Law, 2nd Ed., Vol. 19, p. 775.

Tested by every one of the four considerations here laid down, the relator's application comes too late.

No *circumstances* of whatsoever kind, so far as the record shows, justify the delay. The relator delayed for some reason or purpose of his own, not disclosed.

The *nature of the case* was such as to call for prompt action. Relator knew, as everybody knows, that the police force of the city, even at its full complement, is greatly inadequate, and that the respondent Board could not afford to delay filling vacancies; and since he was required as part of his official duty to have informed himself of the laws of the State relating to the police force, and of the rules of the respondent Board, he knew that as soon as the delay for the new trial should have expired it would be the legal duty of the respondent Board to fill the vacancy. We will not assume that notwithstanding this urgency resulting from circumstances and notwithstanding this duty imposed

by law, for promptly filling this vacancy, the respondent Board did not fill it.

On the contrary, we will assume that respondent did fill it. And so assuming, we find that the case of the relator cannot stand the other test of *whether the rights of third persons have or not become involved*. The success of relator in this proceeding would carry with it the displacement of his successor; and thus the rights of this successor would have been passed on in his absence. This, however, would be no obstacle if the relator had not, by his silence and inaction, contributed to bringing about the situation, but we hold that by not applying for a new trial, or in any way warning the respondent Board of his intention to contest, he left to the respondent Board no choice or discretion but to fill the vacancy.

The *relief demanded*, in so far as it looks to the future, is well; if relator has been unjustly deprived of his position, it is but right that he should be reinstated; but, unfortunately for the case of relator, the *relief demanded* looks also inevitably to the past; the effect of the relator's success would be to consecrate the doctrine, that a displaced official may continue for a year, or indefinitely, for the matter of that, to get his salary without moving a finger towards earning it, by simply delaying to make his application to the courts for reinstatement. We can give our sanction to no such proposition.

Lastly, *the rights of defendant have been prejudiced* by the delay. Every criminal lawyer knows that postponement of the trial of his client is partial victory; witnesses die or disappear and evidence is otherwise lost; and this case, in the manner of its proof, partakes sufficiently of the nature of a criminal case to come within the rule; and we can add that under the particular circumstances of this case there is reason to fear that the respondent Board might, on a trial had at this late day, experience considerable difficulty in producing the testimony adduced on the first trial. And the delay has *prejudiced* respondent in another respect. It has kept respondent during an entire year in the dilemma of having either to run the already greatly inadequate police force of the city short of one captain, thereby to that extent crippling the force; or to fill the apparent vacancy, at the risk of employing one more captain than is permitted by law, that is to say, at the risk of committing an illegal act; and this with the disagreeable and serious concomitant of no legal provision for the payment of the extra employee. The respondent is provided with no

funds except such as the City Council sets aside yearly in the city budget on an estimate made out by respondent every December for the expenditures of the following twelve months. If the relator were reinstated, where under the law the back salary accrued during this twelve months of delay would come from, it is hard to say. The reinstatement of relator would bring disturbance to the finances of the respondent, and the respondent is one of the branches of the public service. And this brings into play another principle of the law of *mandamus* or of *certiorari*.

"Where the reversal of the proceedings sought to be reversed would result in detriment or inconvenience of the public, or is calculated to derange the interests of society, a party is required to act speedily in making his application, and any unreasonable delay in so doing will warrant the dismissal of the writ." Ency. Plead and Prac., Vol. 1, p. 133.

Counsel for relator contends that this matter of unreasonable delay is not specially pleaded by the respondent as a ground of defense; and that, in consequence, it cannot be made the basis of the judgment of the court. The contention is made in view of the fact that the very learned judge *a quo* had like us made this delay the basis of his judgment. We do not think that the matter of this delay needed to be specially pleaded. It is patent on the face of the record. All that the respondent needed to do was to make a full return of all the facts and circumstances of the matter, and it did so. No reproach, surely, could be made to the return on the score of not being sufficiently full and specific. It is for the court to say whether, on all these facts, the relator is entitled or not to the remedy of *mandamus*—an extraordinary remedy the granting or refusing of which addresses itself more or less to the discretion of the court. The court will grant or refuse the *mandamus* on the facts of the case as pleaded and proved, whether the legal deductions from these facts are specially pleaded or not.

"It is to be observed that the courts will themselves take notice of such propositions of law as necessarily grow out of the facts alleged in the return, and since matter of law is not traversible in pleadings it need not be alleged in the return. The principle, as here stated, is well illustrated in cases of *mandamus* to municipal corporations to restore officers who have been removed." High, Ex. Legal Rem., 2nd Ed., p. 370, Sec. 469.

State ex rel. McCabe vs. Police Board.

In the case of State *ex rel.* Hathaway vs. The State Board of Health, where the sufficiency of the return to a *mandamus* was questioned, the Supreme Court of Missouri said:

"While the return contains no specific denial in terms of the matters stated in the petition and writ, still the matters thus stated in the affirmative form on the return do deny all the matters of substance alleged by the relator and this form of a denial must be held to be sufficient." 103 Mo. 27.

We have the less hesitation in denying the relator's application from the fact that the irregularities complained of by relator do not impress us as being very grave. It is probably usual in the proceedings before the respondent Board to dispense with counsel, and to put questions to the party on trial. *Non constat* that if relator had asked for counsel, or had refused to answer the questions, both the request in the one case and the refusal in the other would not have been acceded to. The superintendent of police and the chief of detectives were questioned merely incidentally, not as regular witnesses; and probably this too was in the usual course; and here again it has to be noted that relator made no objection. So far as the other two grounds are concerned they could have any gravity only if the proceedings left the mind in doubt as to what offense the relator was tried for, and as to whether he was convicted; but the proceedings are amply sufficient to place securely within the domain of legal certainty the two essentials, first, that the relator was tried for the offense of "conduct unbecoming an officer;" and, second, that he was convicted. Unlike an ordinary court of justice, the respondent Board is not tied down to any set forms; it keeps safely within the law so long as it conducts its proceedings fairly, without denial of any legal rights, and with sufficient formality to make it appear to a legal certainty that there has been a trial and a conviction for one of the offenses specified by the law as good cause for dismissal. An employee tried before such a Board cannot lie low for slips in the procedure, with a view to taking advantage of them later before other tribunals on application for *mandamus* or *certiorari*. Even in prosecutions for grave crime a defendant is not permitted to take advantage of mere irregularities to which he did not object at the time.

Since everything which we have said in this opinion, with reference to *mandamus*, applies equally to *certiorari* (Ency. of Plead. and Prac.,

Palfrey et als. vs. Sheriff and Tax Collector et als.

Vol. 4, 133), it is entirely unnecessary for us to discuss the question whether *certiorari* would lie in a case like the present one.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed at the cost of the relator.

No. 13,974.

GEORGE D. PALFREY ET ALS. VS. A. W. CONNELLY, SHERIFF AND TAX
COLLECTOR, ET ALS.

I N RE A. W. Connely, *et als*, applying for *certiorari*, or writ of review, to the Court of Appeal, Fifth Circuit, State of Louisiana.

Waller Guion, Attorney General, and W. P. Martin, District Attorney, for Applicants;

Charles A. O'Niell, for Plaintiffs, Respondents, in the Proceeding.

The opinion of the court was delivered by

NICHOLLS, C. J. Most of the pleadings and facts of this case will be found recited in the matter of George D. Palfrey *et als.* vs. A. W. Connely, Sheriff and Tax Collector *et al.*, No. 14,021, upon the docket of this court, the latter being an appeal to the Supreme Court from the judgment rendered therein by the District Court for the Parish of Terrebonne.

The assessor for the Parish of Terrebonne having made an assessment in the name of the plaintiffs upon trees standing on certain lands which belonged to Mrs. Humphreys, upon the ground that by and through a contract between them and Mrs. Humphreys, they had become the owners in full property of the trees standing on the land and which had thus become movables and liable to taxation and assessment separately from the land itself, the plaintiffs enjoined the tax collector from enforcing the tax on the ground that they were not the

owners of the trees and were not liable for taxes upon the same. They further claimed that said trees standing by the roots formed part of the Magnolia Plantation and could not be reached for purposes of taxation by a separate assessment upon them as movables. That they could only be reached for taxation as being part of the plantation and under the assessment made of the plantation. That the trees had been assessed, in fact, as part of the plantation, and the separate assessment was a dual assessment and the property taxed was not properly described. They prayed that the tax be decreed to be not enforced (the claim so to do resting upon no legal warrant); that the assessment be decreed null and void and of no effect, and the inscription thereof on the records be erased.

To meet the contingency of the court's ruling against them, and holding them and their property liable for the tax, they averred that in the contract between themselves and Mrs. Humphreys touching the trees in question, she had bound herself to pay all taxes subsequent to the contract and would be bound as warrantor to protect and hold them harmless from the tax claimed. At their instance, Mrs. Humphreys was cited as a warrantor and judgment against her was contingently prayed for. The District Court rendered judgment sustaining the separate assessments made, dissolved plaintiff's injunction and dismissed their suit. It held that plaintiff's demand against Mrs. Humphreys, as a warrantor under the contract made between the parties, was not well founded, and rejected the same. Plaintiffs obtained two orders of appeal from this judgment, one to the Supreme Court, upon the question of the constitutionality and legality of the tax and of the violation *vel non* of the Constitution and of Act. No. 107 of 1898, especially Section 7 of that act, the other to the Court of Appeals of the Fifth Circuit upon all questions and issues not appealable to and appealed to the Supreme Court.

The appeal to the Supreme Court, under that order of appeal, was not perfected but a later appeal was granted, after the Circuit Court had passed upon the issues before it, under which the appeal was brought up. The Court of Appeals rendered a judgment by which it annulled, avoided and reversed the judgment of the District Court and ordered and decreed that the assessment in the names of the plaintiffs of the property or rights acquired by them be annulled and set aside as having no effect as to plaintiffs. The court declared that, in its opinion, there was a dual assessment of the trees, the assessment upon

the latter being included in and falling under the assessment of the plantation itself; that the trees could not, in the case at bar, be assessed separately from the land to which they were attached as having been "mobilized" by anticipation; that the plaintiffs had not become absolute owners of the trees, but only acquired a right which could be exercised for six years.

Though the court declared that, in its opinion, Mrs. Humphreys was bound by her agreement as to payment of taxes, it did not fix the scope of that agreement and rendered no decree affecting her other than that resulting from the reversal in entirety of the judgment of the District Court, part of which had been in her favor.

Upon the rendering of this judgment, the tax collector and assessor (defendants in the District Court, appellees in the Circuit Court) applied for and obtained an order for a writ of review of the judgment of the Circuit Court, and under that order the record was brought up.

ON REVIEW.

The plaintiffs (George D. Palfrey *et als.*) have sought to change neither the judgment of the District Court nor of the Circuit Court so far as the liability of Mrs. Humphreys to themselves is concerned. The tax collector and assessor have no interest in the situation as between George D. Palfrey *et als.* and Mrs. Humphreys.

That branch of the case is not before us on this review.

We have just held in the branch of this case before us, on appeal, that trees standing on the Magnolia plantation on the first of January, 1900, formed part of the same at that time, and were, therefore, included in the assessment of that property for that year; that it was of that date, and of the property in its condition at that time and on that basis, that the assessment of the plantation and trees was to be made (*Insurance Co. vs. Board of Assessors*, 49 Ann. 401); that the subsequent sale of the trees to the plaintiff did not authorize their being assessed a second time and in their name; that the payment of Mrs. Humphreys of the taxes upon Magnolia plantation included and carried with it the payment of all taxes on the trees which were standing thereon on the first of January; that the law of 1898 expressly declares that taxes on the same property shall not be paid for twice in the same year.

Marks & Rittner vs. Cold Storage Company.

That decision carried with it either directly or by way of consequence all the issues sought to be reviewed in the present proceeding. The conclusions of the Court of Appeal are not at variance with our own, but in accord with them. Under the circumstances, we deem it unnecessary to take any further action herein. It is, therefore, ordered, adjudged and decreed, that the order of this court directing the sending up of the record herein be revoked, that the record be returned to the Court of Appeals and the proceedings here be dismissed.

BLANCHARD, J., takes no part.

PROVOSTY, J., takes no part.

No. 13,577.

MARKS & RITTNER VS. NEW ORLEANS COLD STORAGE COMPANY.

SYLLABUS.

1. The undertaking of the cold storer being to preserve goods liable to undergo, or actually undergoing deterioration through the development in them of insect life, it is not necessary, in order to recover against him for damage to goods, to prove more than that the goods, when delivered into his cold storage, were, according to the usual and ordinary test of commerce, sound.
2. For the deterioration of the goods while in his cold storage he is responsible, notwithstanding that in the heading of the receipt issued for the goods there is printed a limited liability clause to the effect that he is not responsible for "damage" to goods.
3. Interested persons are by our law competent witnesses, and their testimony is binding on the court, unless overcome by counter testimony or irreconcilable with the known facts of the case.
4. The warehouseman has a right to hold possession of the goods stored with him until the amount due him for storage is paid.
5. The amount due for storage on goods cannot be compensated by an unliquidated claim for damage suffered by the goods.

ON REHEARING.

1. A cold storage company may, by contract, limit its liability to the extent that liability may be limited.
2. The limited liability clause should be specific and include in its terms all damages and acts for which the cold storer does not hold himself responsible.
3. A paper admitted in evidence, without objection, will be taken as the commencement of proof of a particular fact.
4. The holder of the receipt is entitled to delivery of the property stored upon tender of payment of charges on the property itself, and payment of

Marks & Rittner vs. Cold Storage Company.

charges on other property of owner cannot be required before delivery.
There must be a tender made in due form of the charges.

5. Storage is due on damaged goods for which the storer is made to pay.

A PPEAL from the Civil District Court, Parish of Orleans.—
Theard, J.

William S. Parkerson, for Plaintiffs, Appellants.

McCloskey & Benedict, for Defendant, Appellee.

The opinion of the Court was delivered by

PROVOSTY, J. Having on hand large quantities of cow-peas, and June coming on when cow-peas are in danger of being damaged by weevils in the climate of New Orleans, the plaintiffs separated the mixed peas from the straight clay peas and put the latter, the more valuable, in the cold storage warehouse of the defendant company for preservation until the opening of the next season, say March following. The quantity thus stored was 13,028 sacks, and the transfer to the cold storage was effected between the 9th and the 18th of June. Afterwards, a few days more than a month afterwards, between the 19th and 30th of July, plaintiffs transferred to the same cold storage what they still had on hand of the mixed peas, namely 2,099 sacks. In the course of the following season, plaintiffs withdrew the peas from the cold storage as the requirements of their trade demanded, until the defendants refused to make further deliveries, claiming the right to hold the peas for unpaid storage, and thereupon the plaintiffs immediately brought the present suit. This was in July, 1898, a year after the peas had been stored.

Plaintiffs allege that of the peas withdrawn 642 sacks were damaged, and had to be sold for \$433.19 instead of \$1,249.96, the regular price; and that defendant owes them the difference, viz.: \$816.77, the damage having come about through its fault. And they allege, further, that the defendant refuses to deliver to them the remainder of the 13,028 sacks of peas, namely 1,250 sacks; that the same are damaged to such an

extent as to have lost all value; that the damage came about through the fault of defendant, and that defendant owes the value, viz.: \$2,458.33. And plaintiffs allege, further, that of the 2,099 sacks of peas defendant still holds and refuses to deliver 1,360 sacks, and owes the value, \$616.05. Plaintiffs do not say that these 1,360 sacks are in any worse condition than they were when put in cold storage.

The defendant denies that it has been in fault; avers its rights to detain the cow-peas until payment of the amount due for storage, and claims in reconvention the amount thus due, namely \$1,896.65.

At the request of the plaintiffs the peas detained by defendant were sold by the sheriff soon after the institution of this suit. The 1,250 sacks sold for \$431.72, and the 1,360 sacks for \$198.98.

The business of the defendant is to preserve perishable articles by means of cold air. Articles received by defendant for preservation are supposed to be liable to undergo or to be actually undergoing a process of deterioration through the development in them of insect life, and the undertaking of defendant, for which it is paid more than quadruple the price of ordinary warehousing, is to prevent or arrest this process. In order to recover against defendant, therefore, it is not necessary for plaintiffs to show that their goods were not affected by insect life when put in cold storage, or that the process of deterioration had not begun in said goods, but that said goods, by the usual and ordinary tests of commerce, were classed as sound.

The two plaintiffs and Mr. McMillan testify positively and emphatically that they tested every sack of the peas, this test being made as the peas were being hauled to the cold storage, and found the peas to be perfectly sound. The interest of these witnesses detracts from the weight of their testimony. (Mr. McMillan has against the defendant a claim similar to that of the plaintiffs.) But the witnesses are three in number; they are by our law competent witnesses; they are business men of this city; and, after all allowances have been made, their testimony is binding on the court. The supposition of these witnesses having been mistaken is excluded by the fact that they were large dealers in peas, entirely competent to test the peas, and by the further fact that the testing of the soundness of a pea is a very simple matter; a sound pea being cold, and a weevily pea hot.

The superintendent of the cold storage testified to the machinery of the cold storage having run perfectly while the peas were in cold storage, and a large number of dealers in different kinds of perishable

articles who had goods in the cold storage during the time that the peas of the plaintiffs were there testified to their goods having been properly preserved; and we have no doubt at all that the machinery of the cold storage was properly run.

The peas, then, having been sound when put in, and the machinery having run regularly, it must be that the damage to the peas occurred before the cold had penetrated sufficiently to arrest deterioration. If so, defendant is responsible; for it was its business to know what quantity of peas it could safely admit at one time into its cold storage.

This responsibility of the defendant the superintendent of the cold storage, Mr. Scratchly, was alive to, for we find him cautious about letting in the peas too fast. "Saw Mr. Scratchly," says Mr. McMillan, "and asked him whether he couldn't take them a little more rapidly, as we wanted to get them in, and he said they were having a little difficulty with the temperature keeping it down to where it should be, and he would only take in a certain amount a day, as he didn't want to endanger the temperature of the warehouse."

We can explain the deterioration of the peas in no other way than by assuming that the superintendent was not cautious enough, and did "endanger" the temperature of his cold storage by letting in the peas too fast or in too great quantities. The largest quantity the defendant had ever stored previously was from 6,000 to 7,000 sacks, whereas this time, in the brief space between the 9th and 18th of June, it undertook to accommodate 13,028 sacks for plaintiffs and 26,099 sacks for McMillan & Co.

There is evidence that the peas were stored too much in a pile, and we must say this evidence is but very faintly contradicted by Mr. Scratchly.

Of the 13,028 sacks of peas 5,422 were transferred into the cold storage directly from the cars that had brought them from Tennessee, and 7,606 were transferred from the warehouse of Holmes & Co. in this city. The peas transferred from the cars came out of the cold storage all sound. Defendant argues that since all the peas from the cars came out sound, and the peas from the warehouse of Holmes & Co. came out damaged, it must be that not the cold storage but the warehouse is responsible for the damage. The argument, though possessing considerable force, is by no means conclusive. In the first place, not all the peas from the warehouse of Holmes & Co. came out of the cold storage damaged, but only some of them; 5,910 sacks came out sound; a

larger amount than the total quantity that came from the cars. The peas from the warehouse of Holmes & Co., which had been subjected for sometime to the temperature of New Orleans, may have carried with them into the cold storage a greater quantity of heat than did the peas direct from Tennessee. Moreover they may have been stored less advantageously.

The loss resulting to the plaintiff from the deterioration of the 642 sacks of peas is not proved. As to these 642 sacks we must therefore non-suit plaintiff.

The defendant had a right to hold possession of the peas until the storage was paid. C. C. 2956. The storage could not be compensated by the plaintiff's unliquidated claim for damages. C. C. 2209. Plaintiff can therefore recover nothing for the 1,360 sacks that were in a damaged condition when put in the cold storage. It is not alleged that these 1,360 sacks deteriorated while in the warehouse of plaintiff; the only allegation is that defendant refused to deliver them up; and, since we have held that defendant properly so refused, we can allow the plaintiff nothing on this demand.

The price for which the peas were sold belongs to plaintiff, subject, however, to the pledge of the defendant to secure the amount due for storage.

Of the 1,250 sacks, 1,054 were damaged. These were sold at $19\frac{1}{2}$ cents per bushel. Had they been sound they would have brought $36\frac{1}{2}$ cents per bushel. Plaintiff is entitled to recover from defendant the difference. There were 1,578 bushels, which, at 17 cents per bushel, the difference between $19\frac{1}{2}$ and $36\frac{1}{2}$, amounts to \$268.26.

The sale made by the sheriff, having been made at the instance of the plaintiffs, was the act of the plaintiffs, for which the plaintiffs alone are responsible. This sale must be held to be the exact equivalent of a private sale made by the plaintiff. As such it measures the value of the peas at the time they were taken out of the cold storage and sold.

On the reconventional demand defendant is entitled to judgment as prayed, with recognition of the depository's pledge on the price of the peas sold by the sheriff.

The defendant was sued on its general liability as a cold storer, and it answered by a general denial. It did not plead any special contract. But we find that in the heading of the receipts issued to the plaintiffs for the peas there is printed the following limited liability clause: "It is expressly understood and admitted that this company do not inspect

or examine condition of goods in receiving same, and therefore are not responsible for contents or damage; it is also further understood that this company will not be responsible for variation in temperature that may arise by accident to machinery or other unforeseen causes. This company will make special contracts at increased rates above tariff when parties storing require guarantee of temperature. In this case goods will be *inspected and examined* at the expense and risk of storer. This company reserves in such special contracts that 48 hours notice to the storer that machinery or building is disabled will terminate such contract and their responsibility under same. Not accountable for leakage, depreciation or damage by rats."

This clause is not specially insisted on in the brief, nor was it pressed in the argument, but giving the defendant the full benefit of it, we do not think that it relieves defendant of its obligation as cold storer to preserve the goods in the condition in which they were when received.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be set aside and that the plaintiffs have judgment against the defendant for the sum of two hundred and sixty-eight dollars and twenty-six cents (\$268.26), with five per cent. per annum interest from this day.

It is further ordered, adjudged and decreed that the price of the sale made by the sheriff in this suit belongs to the plaintiffs, but that the same is subject to the privilege in favor of the defendants herein-after decreed.

It is further ordered, adjudged and decreed that the demand of the plaintiffs for eight hundred and sixteen dollars and ninety-seven cents (\$816.97), difference in the price of the 642 sacks of peas sold as damaged, be rejected as in case of non-suit.

It is further ordered, adjudged and decreed that the defendant have judgment against the plaintiffs for the sum of one thousand eight hundred and ninety-six dollars and sixty-five cents (\$1,896.65), with five per cent. per annum interest thereon from the 18th of October, 1898, and that to secure this judgment the defendant have a depositary's privilege on the price of the sale made by the sheriff in this suit.

It is further ordered, adjudged and decreed that the defendant pay the costs of the main suit in the lower court and the costs of appeal; and that the plaintiff pay the costs of the reconventional demand.

ON REHEARING.

BREAUX, J. Application was made for a rehearing on a number of grounds which we considered sufficient to reopen the case and hear further argument.

Plaintiffs contended that the loss resulting from the deterioration of peas was amply shown, and that our decree should be amended so as to allow them an amount equal to this loss. Secondly, that defendant had no right to hold possession of the property stored until all charges had been paid, for the reason that plaintiffs were always willing to pay storage on any goods which they would withdraw, and the twelve hundred and ninety and 59-100 dollars admitted by plaintiffs in their petition to be due was for storage on the goods already withdrawn; that an amount claimed of six hundred and six and 6-100 dollars, and heretofore allowed, was never earned. The charge was for preservation of goods, which had not been earned; that the price fixed in the decree for the peas was too low and that it should be increased to an amount equal to the value of sound peas at the time.

Defendant made no application for a rehearing, but in argument at bar, through its learned counsel, contended that all the issues should be reconsidered and the whole claim rejected.

There was much said by defendant's counsel in argument which was persuasive, in view of the restricted liability stipulated in the contract of storage between plaintiffs and the defendant.

Heretofore it was considered that throughout the trial the burden of proof was with plaintiff, in view of this contract. None the less, after having considered the evidence, the court concluded that its weight was with plaintiffs, and rendered its decree accordingly.

We are impressed by the argument of defendant's counsel, made with force and clearness at bar, that our decision would perhaps prove somewhat of a hindrance to the cold storage industry. In consequence, as relates to storage, we are moved to go over the entire ground again.

The evidence, as heretofore considered, led us, we think, to a correct conclusion, although the *practical observation* of witnesses who testified in this case did not entirely accord with *entomological science*. We point out the difference between the two. Our conclusion is that, in the main, the difference is not considerable. Practically, it was thought by the witnesses that the insects by which the peas were destroyed were a part of the pea, coming spontaneously from it, and growing with it,

and that when they reach the perfect condition, they flew away, committing no further damage.

We have found, after consulting several authorities, that entomology teaches that in the early spring the female weevil (*Bruchus pisi*, the pea weevil of the naturalist) fastens its egg upon the newly formed pod of the pea in a way that renders it difficult, at first, to find that the grain is attacked. The egg gives birth to a white larva which feeds on the substance of the pea, and takes its life from it. The farinaceous substance of the grain is favorable to its growth, and it is while thus growing that the damage is done. When this larva passes into a perfect state, the weevil bores through the pods, and, as a destroyer, commits no further damage except in giving birth to eggs, which are inserted in the pea as before mentioned.

Cold storage will not destroy the weevil; it can only check its growth and development while in an embryo state. In winter the weevil finds shelter from the cold in the cracks of walls and other secluded places. It does not increase. The cold destroys many. In summer they invade the different cereals. They do not lay their eggs on the surface, but at some depth in the heaps of grain; a very minute dot on the surface of the pea being the only external evidence of the presence of a weevil larva.

We infer that in this case the presence of the weevil or of its larva and the extent of the damage escaped the attention of the plaintiffs and the defendant. All agree that in cold air the weevil does not lay eggs and the larva is harmless. But it takes a temperature of, at least, ten degrees centigrade to check their increase. Here cold storage becomes useful, and is, when the peas have been properly stored, some protection against damage by weevil.

There are methods of destroying them that give rise to interesting study to the student of entomology. We are reminded by the necessity of some brevity that, although the subject is interesting, we must not pursue its study any further, and that we must limit our discussion to the work the cold storage undertakes when it receives peas on storage, and this we think we have done by indicating the degree of temperature required to check the growth of insects of the weevil kind.

Our decision found that the heaps of peas were too large, and that the defendant did not sufficiently look after the ventilation of the cold air it controls. After a re-examination, we are not satisfied that an error has been committed. Defendant places great reliance upon the

receipt it gave for the peas and the limited liability clause printed therein. We understand that the defendant can limit its liability, and that those who sign the limited clause will be bound by its terms. But in this case oversight and negligence have been found which are not covered by the limited liability clause of the receipt, and from which we do not understand from the testimony that it ever was the intention to relieve the defendant. Certainly, the language used leads to such inference. One may stipulate waiver as extensive as he pleases, provided it does not contravene rules and laws enacted on grounds of public policy. The waiver must express the full extent intended.

We take up for decision each item separately.

An exhibit identified by the letter A is annexed to the plaintiffs' petition and clearly shows that the cow-peas for which it accounts were sold from April 8th, 1898, to July 22nd, 1898, for four hundred and thirty-three and 19-100 dollars. This exhibit was offered in evidence contradictorily with defendant who permitted it to be filed without objection. We think we are warranted in considering it to be properly before the court, and that it and other evidence shows that plaintiffs are entitled to \$689.28, on item represented by statement A. If sound, they would have brought, it appears, ninety cents per bushel—eleven hundred and twenty-two 47-100 dollars. They sold for four hundred and thirty-three 19-100 dollars. The difference they would have brought if not weevily is six hundred and eighty-nine 28-100 dollars.

In seeking to fix the value of these peas (not weevily when delivered to storage company), our attention was arrested by the testimony of a witness of the defendant who said that he, in 1898, commenced selling peas at 90 cents. Mixed peas were sold for 75c per bushel; Whip-poor-will at 85c. Another witness spoke of 80c as having been the selling price. True, plaintiffs' peas were of the better quality of clay peas and worth from 10c to 25c more than the other. Taking the minimum of value of the ordinary and mixed peas and the minimum additional for the clay peas, we fix the price at 90c a bushel. It must be remarked that these peas were carried over by plaintiff from the season of 1897 to be sold in 1898, when they were not as valuable, we infer from the testimony, as they were in 1897, and not as fresh as they were in the latter year.

The next ground of complaint is based on the refusal of the defendant to deliver the peas to plaintiffs before the storage was paid. Defendant held possession and claims for storage while it held possession

Plaintiffs deny defendant's right to recover for this storage because, as they aver, they offered to pay charges for storage which they assert defendant refused to accept.

Plaintiffs' contention is that separate negotiable warehouse receipts had been issued by the defendant for the peas; that defendant could not in law refuse to deliver the peas called for by one of the receipts, upon the ground that the storage on other peas which had been withdrawn on other receipts had not been paid. In other words, that it was not an advance made on the deposit, nor a claim arising from the deposit of the particular goods stored which plaintiff wished to withdraw from storage. Plaintiffs say that they were willing to pay storage on the goods they desired to withdraw, but on none other, although, as we understand, there were other charges due.

The Statute 156 of 1886 is clear enough that on the presentation of a warehouse receipt properly endorsed and the tender of charges upon the property represented by it, the holder of the receipt is entitled to the property it covers. While it is true that under the terms of this statute the holder of the receipt is entitled to delivery of the property upon the tender of payment of all charges on the particular property for which the receipt calls, yet there must be a tender in order to enable the holder of the receipt to recover damages growing out of delay in not delivering the goods when delivery was timely and properly asked.

Here there was no tender made. There was an offer such as is usual in a business community during the course of business, as will be seen from the following which is copied from the testimony:

Cross-Examination.

"Q. Did you tender them in cash the amount of money due on those peas?

"A. No, sir; not in cash.

"Q. Did you tender them anything?

"A. No, sir."

Clearly, this being the fact as relates to tender, plaintiffs continued to owe storage on the property which they did not offer to withdraw by making the tender the statute requires.

Plaintiffs claim the amount of six hundred and six and 6-100 dollars for storage on the damaged goods. The complaint on this score is that plaintiff was to pay four times the ordinary warehouse charges, and that, as defendant did not preserve the peas, it failed in performing its

contract, and is, in consequence, not entitled to anything; that it should not recover compensation for failing to do that which it had bound itself to do. The defendant did not succeed in preserving the property, it is true, but, at the same time, it does not appear to us that there was such culpable negligence as renders it necessary to hold that it has lost all right to anything for the services it did render, although it failed.

The property stored, although damaged, retained some of its value; besides, defendant is condemned to pay its value, that is, to make up for the loss by paying the difference between sound and unsound peas. It should receive storage on the theory that if these peas had been sold in a sound state, defendant would have received storage.

Plaintiffs complain of the value of the peas as found by the court. The original opinion states, and this is not denied by plaintiffs, that it was at plaintiffs' request that the peas were sold at public auction. The theory of the opinion was that plaintiffs had not complied with the statute cited *supra* with regard to tender, and that defendant was not alone at fault for the delays in disposing of the peas; that plaintiffs, also, had given them, at least, an implied assent by not energetically demanding delivery of the property and tendering the amount due thereon. We are not convinced that we should change that ruling and recall all that has been heretofore held in that regard.

We have not found any good reason to increase the number of bushels from fifteen hundred and seventy-eight to twenty-one hundred and eighty bushels. The court concluded, heretofore, to adhere to the minimum number. We would not feel justified in changing the number, unless it was manifest that an error had been committed.

We do not change and increase the amount heretofore allowed for the peas sold by the sheriff, particularly, for the reason that the following which appears of record would not warrant an increase:

"It is admitted that this receipt calling for 2,029 sacks of peas, on the reverse of which is written 730 sacks delivered to Mark and Rittner, 1,569 sacks to the sheriff, were stored in the warehouse as weevily peas on the date specified in the receipt."

In view of this fact, we do not think that the price or the weight of the lot should be changed, for it may have been just as deficient in weight as compared with sound peas on the day it was delivered to the storage as on the day it was sold.

Lombard vs. Bank.

To conclude, then, plaintiff is entitled to a judgment for six hundred and ninety-one 59-100 dollars (\$691.59), as above stated, with 5 per cent. interest from this date, and to this extent the original judgment is amended, and in other respects it is affirmed, making, with the amount allowed in our original judgment, the sum of nine hundred and fifty-nine 85-100 dollars.

As amended, our original judgment is reinstated and made the judgment of the court.

No. 13,765.

E. H. LOMBARD VS. CITIZENS BANK OF LOUISIANA.

SYLLABUS.

1. An order of court directing a party to the suit to set out his claim more specifically will not be reversed unless it is manifest that error has been committed.
2. It is not unreasonable to require of the pleader, who sues on a contract, to disclose whether he sues on a written contract or on a verbal contract.
3. Facts essential to sustain the suit should be stated.
4. A plaintiff is not entitled, as a matter of right, to an examination of defendant's books and papers to an extent requisite to enable him to make sufficient allegations to sustain his actions. His ground of attack should be sufficiently explicit to enable him to compel his adversary to produce needful books and papers on the trial.
5. Agreement of counsel, subject to different constructions, will not be taken in the presence of a disagreement as to the extent it was intended to include.

A PPEAL from the Civil District Court, Parish of Orleans.—
King, J.

Benjamin Rice Forman, for Plaintiff, Appellant.

Henry Denis and *Branch K. Miller*, for Defendant, Appellee.

The opinion of the Court was delivered by

Lombard vs. Bank.

BREAUX, J. Appellant complains of a judgment of the District Court dismissing his suit on exception.

Appellant alleged in his petition that defendant is indebted to him in the sum of nine thousand four hundred and fifty dollars, because he, in 1891, was employed by the board of directors as land agent, and to look after the lands and property belonging to the mortgage department of the Citizens' Bank at an annual salary of three thousand dollars; that his contract of employment has been renewed annually including the year which ended on the first of February, 1901.

We quote from plaintiff's petition: "That up to the first of January, 1891, the said sum of three thousand dollars was annually paid him, but that thereafter he paid back at the rate of one hundred dollars per month or allowed the cashier to deduct, on account of an indebtedness which, up to the time, to-wit: the second of January, 1894, was canceled and paid up, but that thereafter the President of the Citizens' Bank wrongfully, illegally and without his consent, retained from his salary one hundred dollars a month for seventy-eight months, which has never been paid to him the petitioner, seventy-eight hundred dollars which is still due and unpaid, and your petitioner continued at the annual salary *on his contract, renewed annually*, at three thousand dollars a year, in the service of the said bank until the seventeenth of July, 1900, when he was discharged, and the action of the President in discharging him was on the third of August, 1900, ratified by a majority of the directors of the bank, and they *broke their contract*. He offered to continue until the end of the year, which was refused; that the bank owes him the whole of the July salary, less one hundred and ten dollars drawn on account during which month he rendered services for which he is entitled to a balance of one hundred and forty dollars and for the further sum for damages caused by the *breach of contract* for the residue of the year from the first of August, 1900, to the first of February, 1901." (Italics ours.)

Defendant filed an exception to this petition on the ground of vagueness, and averred further that plaintiff should allege whether he declared on written or a verbal contract; if verbal, with whom it was actually made; if in writing, defendant was entitled to *oyer*; that defendant is entitled to know in what mode the consent of the board of directors was given, whether by resolution or otherwise; if by resolution, its date and the form and manner the board manifested its consent; that plaintiff should set forth the nature of the indebtedness.

Plaintiff on the day of the trial offered to file an answer to the exception in which he averred that the *contract of employment* was entered into when he was employed originally, and that it was changed and modified from year to year afterward; that his salary originally was to be two thousand dollars a year and ten per cent. upon the revenues which he would succeed in realizing in the department of which he had charge, and that, subsequently, it was agreed that he should have a fixed salary of four thousand dollars a year, and afterwards this salary was reduced by one thousand dollars, and it thus remained until the contract was broken by the President of the bank; that these changes and modifications appear in the correspondence of the Citizens' Bank and in its books and minutes; that it is impossible for him to produce these books and papers. This answer was refused by the court, and plaintiff reserved a bill of exceptions to the ruling.

The exception of the defendant was then maintained and the plaintiff was directed to amend his petition. Plaintiff then filed a supplemental and amended petition in which he reiterated his demand and dwelt at some extent upon the particulars of his claim. With reference to his contract, plaintiff in his supplemental petition avers that it will appear by the resolution of the board of directors and the books of the bank *when his contract was made*. Plaintiff complains of the action of the President in deducting an amount monthly from his salary in satisfaction of a debt of which he did not owe the amount.

The District Court, in ruling, after the supplemental and amended petition had been filed, said, in substance, that plaintiff must set forth a cause of action, and whether he declared upon a written or oral contract; if upon the former, date and contents should be given, and if in defendant's possession when called upon, he should file it. If upon a verbal contract, needful particulars should be alleged to enable plaintiff to prove up his cause.

Plaintiff declared on a contract, to which he particularly refers in his pleadings. He was directed by the court to state whether or not it was in writing. No good reason suggests itself upon which to sustain the refusal. We have attentively read the brief, and have not found that any grounds at all are given for refusing to comply with the court's ruling in this respect. When a pleader declares on a contract, he may be called on to declare whether it is an oral or a written contract, and if he makes no attempt to comply with the directions, it is not improper to dismiss the action. It devolves upon the judge of the

court of original jurisdiction to make up the record, and, whenever in his judgment a motion to make more specific allegation is granted, we, in the nature of things, are not hasty in reversing his judgment entered in order to make records complete.

The District Court has authority, in case the allegations of facts are not specific enough, to issue such orders as will result in the bringing of a new suit with consistent averments.

There are slight incongruities in the petitions. In the first, the year in which the contract was entered into was 1891. In the supplemental petition, plaintiff's employment commenced in 1873. In the original petition plaintiff sets forth that his salary was the amount of three thousand dollars *per annum*. In the supplemental petition, plaintiff avers that in addition to the salary stated he was entitled to an amount contingent upon his success in managing the business he had in charge.

Plaintiff also averred that from the first of January, 1891, to the second of January, 1894, he allowed the cashier to deduct one hundred dollars a month on account of an indebtedness which was paid in full on the day last mentioned, but that the President of the bank continued to deduct from his salary until the deductions amounted to seventy-eight hundred dollars. The court directed, as we understand, that more specific allegations be made of the indebtedness upon which plaintiff has paid one hundred dollars a month.

Plaintiff claims a note of five thousand dollars, and complains of the action of the bank in charging him with this sum in their dealings. No allegations of the date of this note are made, and no good reason shown why this note should not be referred to with more particularity. Plaintiff also alleges that defendant held his mortgage note prescribed on property in the Parish of St. Bernard which was foreclosed in 1888, and that the President of the bank agreed with him that if he interposed no objection to the sale, the proceeds should be taken as satisfying his indebtedness.

The reason given for not making specific allegations regarding this record of foreclosure of mortgage in the Parish of St. Bernard would be sufficient and would be maintained for not producing the record on the trial of the case, but it is not sufficient to supply deficiency of allegations of a petition. We do not infer that this record was withheld from plaintiff in order to prevent him from making all needful allegations to sustain his demand.

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No reason is given why the petition should not set out whether plaintiff sues on a written or verbal contract, but counsel says that, under the ruling complained of by him, if a plaintiff, who had been twenty-eight years in the service of the defendant, and whose contract has been changed from time to time, cannot recall the precise date when these contracts were changed, and has not access to the records of the bank, he is to be thrown out of court and denied his just demand. We do not construe the ruling complained of as plaintiff chooses to contend. Dates and matters of description are not essential to the extent of always requiring the dismissal of the action. Dates may be supplied; errors corrected. The pleader, however, must set out the contract upon which he bases his action. He has the burden of allegation. He must set forth his ground of attack with some certainty. The court determined, no doubt, that the multiplicity of averments were slightly confusing and that it was best in the interest of all concerned to relegate the parties to one petition setting forth plaintiff's demand instead of multifarious issues as presented.

We come to the second ground of complaint, to-wit: That defendant would not permit plaintiff to examine its books and papers in order to enable plaintiff to more fully set forth his case. A party is without right to oyer of papers and books to enable him to prepare his attack. He is expected to force an issue sufficiently definite to enable him to compel the one sued to bring into court needful books and papers. To this end he is expected to allege the facts he intends to prove by the books and papers.

Plaintiff in his supplemental petition says that the date of the contract will appear by the resolution of the board and the books of the bank, and invokes a verbal promise made by Mr. Henry Denis, counsel for the bank, in open court, which the president of the bank subsequently declined to comply with. The letter of the plaintiff's counsel, and the answer, both concise and to the point, explain, and we for that reason insert them.

"Henry Denis, Esq.

"Dear Sir:—You said yesterday in court that I need not take out any *subpoena duces tecum* on the bank. Will you kindly give instructions that Col. Lombard can have access to the books and papers and take copies.

"And oblige,

"Yours truly,

"B. R. FORMAN."

Answer:

"Mr. B. R. Forman.

"Dear Sir:—Under all circumstances your request to have the books, minutes and papers of the bank shown to Mr. Lombard would be too indefinite; but Mr. Nott says that he does not ratify my statement as to willingness on the subject.

"In haste, yours, etc.,

"HENRY DENIS."

We do not think that the court erred in declining to enforce an agreement of counsel which, doubtless, owing to the haste of the moment, resulted in a disagreement with regard to the scope of the agreement.

We have found no error in the judgment of the District Court.

It is therefore ordered, adjudged and decreed that it be affirmed.

No. 14,214.

STATE OF LOUISIANA VS. JAKE SIMS AND GUS MAYS.

SYLLABUS...

1. The judge may refuse to give a special charge the matter of which has been already substantially covered in the general charge.

A PPEAL from the Fifth Judicial District, Parish of Jackson—
Machen, J.

Waller Guion, Attorney General, and *A. B. Hundley*, District Attorney, (*Lewis Guion*, of Counsel) for Plaintiff, Appellee.

C. P. Thornhill, and *George Wear*, for Defendant, Appellant.

The opinion of the court was delivered by

PROVOSTY, J. The defendant, Jake Sims, on trial for larceny, requested the court to give the following special charge:

"That if they had any reasonable doubt as to whether the defendant knew or did not know that Gus Mays was not the owner of the cotton, they should give him the benefit of the doubt and acquit him; or if

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the proof showed to their satisfaction that defendant believed, or had reason to believe, that Gus Mays was the owner of the cotton, they should acquit him."

The Judge refused to give the special charge, for reasons given by himself, as follows:

"The court refused to give the charge for the reason, that the general charge of the court had fully covered the question of guilty knowledge; the court, in explaining the felonious intent, charged the jury that 'felonious intent means without the color of right in taking, and if the defendant honestly believed at the time of the taking that he had a right to take the cotton, that it was their duty to acquit him,' of course if the accused thought this cotton was the property of Gus Mays, or the jury had come to that conclusion, that he ever had a right to think so, or that he was authorized by Gus Mays to take it, this charge, in the opinion of the court, was fully sufficient for them to acquit. Besides, to have given the charge in the language asked for, would have been trenching upon the facts and invading the province of the jury, and would have been too specific."

Our learned brother was right. Our jurisprudence is uniform that when the trial judge has substantially covered in his charge all that is asked to be specially charged, he is justified in refusing to give the special charge; and an inspection of the two charges will show that the special charge was substantially covered in the general.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed at the cost of the appellant.

No. 14,220.

STATE OF LOUISIANA VS. EUGENE BROUSSARD.

SYLLABUS.

1. While "with a dangerous weapon" is part of the definition of Sections 790, 791, 793, Revised Statutes, and Act 44 of 1890, the use of the words, "shooting with intent to kill and murder" necessarily supplies the words "with a dangerous weapon." Shooting with intent to kill and murder adds to the sentence, by its meaning, the words "with a dangerous weapon," as one cannot shoot with such an intent as conveyed by the statute without the use of a firearm.
2. The word "Intention," as used in the indictment, is accepted as a sufficient substitute for the word "Intent" of the statute.

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A PPEAL from Eighteenth Judicial District, Parish of Acadia—
DeBaillon, J.

Walter Guion, Attorney General, and *William Campbell*, District Attorney, (*Lewis Guion*, of Counsel) for Plaintiff, Appellee.

Story & Pugh, for Defendant, Appellant.

The opinion of the court was delivered by

BREAUX, J. The defendant was indicted for shooting with the "intention" to commit murder. He stood his trial and was convicted by a jury and sentenced by the Court to twelve years hard labor.

In his motion in arrest of judgment, which brings up the questions before us for decision he complained of the indictment for not showing that the wound he is charged with having inflicted was inflicted with a dangerous weapon and that no weapon is mentioned in the indictment.

The objection is also urged in defense that the use of the word "intention" instead of "intent" in the indictment is a fatal error. The motion in arrest having been overruled by the District Court a bill of exception was taken. The question before us is not a new question in this State. We substantially agree with the learned counsel for the defendant that the essential facts must be directly and substantially alleged, that nothing should be brought into the charge preferred by intendment or inference. But that this carries with it the necessity of quashing and setting aside an indictment because it does not contain special reference to the dangerous weapon with which the crime was committed is a proposition to which this court is not prepared to assent, in view of the fact that in at least two cases which have the appearance of being well considered cases, it was decided that the omission is not fatal to the indictment.

The act of shooting has always been held to include a dangerous weapon as having been used in shooting. While it is well settled that the indictment shall state everything necessary to constitute the offence, and this with certainty, this court has always held that the act of shooting sufficiently describes the offence as having been committed with a shooting instrument. The definition in the sense set forth in the

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statute is inseparably associated with shooting with a firearm. This is the view heretofore expressed and from which we find no occasion to disagree, as it seems to have stood the test of time and experience.

The prosecution was, in the first case cited *infra*, as in the case in hand, under Sec. 791 of the Revised Statutes, which makes a crime the willful shooting with intent to murder. The court said in substance, that the words shooting with intent to murder rendered it unnecessary to add the words "with a dangerous weapon." The court states with great confidence that the words "with a dangerous weapon" would have been avoided had the acts made crimes by Sec. 791 been limited to shooting. But that "stabbing," "thrusting," "cutting" and "striking," or other acts denounced and which may be committed without firearms, declared the court, "with a dangerous weapon" were used because needful in making these acts crimes, but as relates to the former the act of shooting without additional words when shooting is done in the meaning of the statute it is always with a firearm.

We are not inclined to differ from this view. In *State vs. Mosely & Anthony*, 42 Ann. 975, the court found confirmation of its views in *State vs. Cognovitch*, 34 Ann. 529, and took occasion to comment at some length upon the case of *State vs. Humphries*, 35 Ann. 966, saying that the indictment was preferred under Sec. 790 of the Revised Statutes and omitted the words with a dangerous weapon, although required by this section. The Court approvingly quotes from this decision and affirms it as being an entirely correct exposition of the law upon the subject. Shooting a person while lying in wait (said this Court) for the victim, with intent to kill, cannot be done without a dangerous weapon. All the ingredients of the crime, the willful shooting, the waiting for the opportunity, the murderous intent, all presuppose and imply the use of a dangerous weapon. The use of the words in the indictment is not sacramental.

There is no question but that it was the well settled intention of the court (in the cases cited) to hold the indictment good in law when preferred for shooting under the statute under which this defendant was indicted and found guilty. The court, in the case cited (42 Ann. 795), went to the extent of treating the two "shooting" and "shooting with a dangerous weapon" as mere repetition. "Tautology is useless and even if used in the statute need not be perpetuated in the indictment," an extreme view which perhaps serves to make clear the court's meaning.

We will not go to the extent of holding that it would have been mere tautology to use both the "shooting" and "the dangerous weapon." We think that prosecuting officers should use the language of the statute, yet in this case we find it possible to conclude that the shooting charged must have been by means of a deadly weapon, that this word "shooting" adds to the sentence words which the painstaking and vigilant prosecuting officer failed in this instance to insert.

The Bellard Case, 50 Ann. 594, to which learned counsel has invited our attention in his brief and in his argument at the bar, does not sustain defendant's contention. The Court said in that case, "We cannot read the verdict as guilty of striking with a dangerous weapon when the verdict is simply guilty of striking" for the very good reason doubtless that it does not follow that one guilty of striking is guilty of striking with a dangerous weapon, different in this respect from shooting, which must be, as the court has heretofore decided, with a fire arm.

Having disposed of this point, we pass to the next proposition before us for decision, viz: that "intention," the word used in the indictment, is not equivalent to the word "intent" used in the statute. We are informed by Mr. Bishop in his *New Criminal Procedure*, Vol. 2, p. 81, that the word "intention" has been accepted as a substitute for "intent" in an indictment. The learned commentator adds in a note that if the indictment was defective from this cause, it was cured by a statute upon the subject, but none the less he says that the substitute word is not error. Consulting the definition of the word as defined in the different dictionaries, we find that intention is as strong a word in meaning as intent. It expresses a stretching or bending of the mind toward an object even more forcibly than the word "intent." It is from the same root and has as direct and strong a meaning. If one shoots with the intention of killing he must be held as guilty as if he had shot with intent to kill. A word of meaning at least equivalent beyond all question with another can be used as a substitute.

This brings our review of this case to a close. We have not found the grounds forcibly urged in the defence reason to disturb the verdict and sentence.

It is ordered, adjudged, and decreed that the judgment appealed from be affirmed.

Rehearing refused.

No. 14,297.

CITY OF SHREVEPORT VS. MALONEY AND SCHULSINGER.

SYLLABUS.

1. The following is an article of the Constitution (Art. 188): "Gambling is a vice, and the Legislature shall pass laws to suppress it." Gaming unlawful by statute remain in force.
2. Laws heretofore passed against gambling do not include betting on horse races in any form. Betting on horse races, in view of the bettors, within their means, is not unlawful, but, on the contrary, has the law's special sanction. The question whether the betting on races at a distance, out of view, through the medium of the turf exchange, should be suppressed as being gambling, is one left to the Legislature by the clear terms of the Constitution.
3. The law grants an action for the payment of bets on games tending to promote skill "in the use of arms, such as the exercise of the gun, and foot and horse racing." If this article affords the opportunity of inducing patrons of races to gamble, to the extent that the gambling is carried on, it should be legislated against under the article of the Constitution cited.
4. Crimes and offenses are statutory; and, if acts become a public wrong against the policy of the State, and the State has designated the authority by which the wrong shall be declared, the authority remains where it has been placed. Gaming is to be prohibited by statute to be enforced by the courts.

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A PPEAL from the First City Court, City of Shreveport.—*Hicks, J*

Edward Hughes Randolph, City Attorney, for Plaintiff, Appellant.

M. C. Elstner, Wise & Herndon, and Farrar, Jonas & Kruttschnitt, for Defendants, Appellees.

The opinion of the Court was delivered by

BREAUX, J. Plaintiff complains of the turf exchange's methods of carrying on business by the defendants within her limits and seeks to have the establishments closed.

The record discloses that the defendants at their respective places of business accepted and made bets on horse races actually run. It appears that on blackboards at their exchanges are posted notices of races to be run with the odds on the horses and the betting. One wishing to bet picks out his horse, pays his money, and receives a ticket therefor. If he has picked out the winning horse, he gets his money back and the amount to which he is entitled on the bet.

The following illustrates the manner of betting. If betting on one of the horses named on the board as one of the racers is selling at four dollars as against six dollars, the one who bets receives a ticket for four dollars, and if his horse wins, he hands his ticket to the exchange and receives back four dollars plus six dollars. If his horse loses, he gets nothing.

The defendants denied that they were guilty, in answer to the charge brought against them before the City Court, and also excepted to the affidavit by which they were denounced, on the ground that the ordinance plaintiff sought to enforce is illegal, oppressive and unconstitutional, and pleaded that Article 188 of the Constitution is not self-operative, as it directs and instructs the Legislature of the State to pass laws for the suppression of gambling.

The judge of the lower court quashed the affidavit and dismissed the defendants upon grounds set forth in a well-considered opinion. From this judgment plaintiff prosecutes this appeal.

At the outset we will state that the issues are confined to horse races and the bets to which they give rise. There is no question before us regarding bets on baseball games or prize fights. It does not appear that bets on prize fights and baseball games have been received since the ordinance attacked has been passed.

If plaintiff were to succeed in bringing the cause within the ban of a prohibitory law, there could arise no reasonable objection to the enforcement of its ordinance against the business now the subject of discussion.

Plaintiff points to Article 188 of the Constitution of 1898 as containing the authority to suppress gambling and as being the prohibitory law which enabled the municipality to adopt the ordinance to which we have before referred.

The power, as we think, was delegated to the Legislature, and under no principle of construction can it be made to read so as to embrace within its terms the different municipalities of the State as having the power to suppress any act as gambling not denounced as gambling by the Legislature.

There is no law on the Statute Books which makes betting on horse races as carried on by the turf exchange a public wrong. It cannot be held to come within the terms of the article cited above for the very plain reason that the article is not operative *proprio vigore*. The Legislature had not deemed proper to carry out its mandate. Until it takes action, the article cited must remain without effect. To the Legislature

alone the power is delegated of legislating against gambling. The intention was, as the judge, to make provision for a general statute on the subject, and not to leave it to one municipality to adopt ordinances against gambling in all forms. Above all, a power having been specially delegated to the Legislature, it is not delegated to one of the subordinate branches of the State government.

If the Legislature should wish to suppress the turf exchanges throughout the State, or in any particular locality, as to that matter, it has it in its power to legislate to that end. It is not left to the municipality of Shreveport, under its present charter, to make that gambling which the Legislature has not heretofore denounced as gambling.

Under a general delegation of power to the City of Monroe to regulate and preserve the good order and peace of the city, this court held that the city was authorized to adopt an ordinance prohibiting a game which was specially denounced. See Statute 7 of 1882. There was a concurrent power in the State and in the municipality, the court said, to prohibit the particular act of gambling mentioned. He, the defendant, had transgressed the State Statute. *City of Monroe vs. Hardy*, 46 A 1233.

Here the defendants have not transgressed any State Statute, for the law-making power has remained strictly silent upon the subject of betting on horse racing through the medium of turf exchanges.

In another case, to which we are referred by plaintiff, the evidence satisfied the court that the act which the municipality sought to suppress came within the definition of a lottery and was, for that definite reason, repugnant to the policy of the State, and, besides, the municipality was seeking to enforce a statute of the State adopted to prohibit the particular game denounced as gambling. *New Orleans vs. Collins*, 52 A. 976.

We have no hesitation in saying that the law denouncing lotteries (Art. 178 of the Constitution) is in force, for it is not limited, as is Art. 188 of the Constitution against gambling. It (Art. 178 of the Constitution) announces the policy of the State as being against lotteries and makes it an act repugnant to the peace and good order.

The business of the defendants has never been considered a lottery and, as conducted, it is not a lottery. The basis of the business of turf exchanges is the running of horses and the betting on the results. To an extent, at least, these acts have received legal sanction, as right to recover a bet on the result of a horse race has been recognized, C. C. 2983.

The contention is that the betting made under the conditions here have no tendency to promote and develop fine horses, as the betting is made on races run at distant places in the country, where no race or horse is ever seen by the parties who put up their bets. If horse racing, which in itself has nothing offensive to public morals, as plainly indicated by the cited article *supra*, is made the means to carry on betting which is nothing but gambling, it should receive the attention of the Legislature as directed by Article 188 of the Constitution.

We can only say here, in conclusion, that an offense is an act prohibited, and that the act which plaintiff seeks to prohibit is not prohibited by statute. If these exchanges furnish no races and no race horse is in view, and nothing to elevate and inspire the love of the beautiful; no open air and no bright skies and contented spectators admiring the speed and endurance of the spirited steed, but on the contrary there is only a small room with a blackboard on the side with writing on it in chalk, away from the race course, attracting and decoying the public to take a chance, the evil is one for legislative concern.

This particular function belongs to another branch of the government. It requires legislative action.

Whilst upon us it devolves not to enact but to declare the law.

For reasons assigned, the judgment is affirmed.

No. 14,273.

STATE OF LOUISIANA VS. VINCENT HARRIS.

SYLLABUS.

1. Where a juror is challenged for cause by the State, and the challenge is sustained over the objection of the accused, the latter has no legal ground of complaint where his bill of exceptions does not show he had exhausted, or did exhaust, before the jury was made up, his peremptory challenges, and, in consequence, he had been compelled, later, by reason of the earlier action of the court in sustaining the objection of the State to the juror in question, to accept an obnoxious juror.
2. A ruling of the trial judge that certain testimony offered by the accused is irrelevant will not be disturbed where nothing appears in the bill of exceptions exposing or explaining the connection necessary to show its relevancy.
3. Declarations made by a defendant in his own favor, unless part of the *res gestae*, are not admissible in his behalf.

A PPEAL from the Eleventh Judicial District, Parish of Natchitoches—*Porter, J.*

107 196
109 617
109 618
107 193
118 195

State vs. Harris.

Walter Guion, Attorney General, and *W. A. Wilkinson*, District Attorney (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Jack & Fleming, for Defendant, Appellant.

The opinion of the Court was delivered by

BLANCHARD, J. Defendant appeals from a conviction of murder without capital punishment, and a sentence of life imprisonment at hard labor.

The first bill of exceptions recites that a juror on his *voir dire* was asked, on behalf of the prosecution, "if he would require a higher degree of circumstantial evidence to convict than positive evidence of eye witnesses." He answered he would, and was thereupon challenged for cause. Over the objection of defendant the challenge was sustained, the trial Judge stating:

I explained to the juror that the degree of proof which the law required was that which was sufficient to satisfy the mind beyond a reasonable doubt, and that it made no difference whether this proof was supplied by circumstantial evidence or direct evidence. Notwithstanding which the juror persisted in declaring that he would require a higher degree of proof in a case of circumstantial evidence than in other cases.

It is unnecessary to analyze this ruling of the Judge to ascertain whether it be correct or erroneous, in view of the fact that the bill of exceptions does not disclose defendant had exhausted, or did exhaust before the jury was made up, his peremptory challenges, and, in consequence, he had been compelled, later, by reason of the earlier action of the court in sustaining the objection of the State to the juror in question, to accept an obnoxious juror.

In *State vs. Aarons*, 43 La. Ann. 406, where the defense was that the trial Judge had, for cause, erroneously sustained certain challenges to jurors by the State, this Court said:

The accused has no legal ground of complaint unless the ruling in the rejection of a juror worked him an injury in the selection of a juror obnoxious to him on legal grounds, after the exhaustion of his peremptory challenges.

See also *State vs. Creech*, 38 La. Ann. 481; *State vs. Breaux*, 104 La. 541.

The complaint of the second bill of exceptions is that defendant was not permitted, on cross-examination of a witness for the State, to show that the woman killed was a common prostitute and kept a public house.

The Judge recites as reasons for exclusion that:

The fact that the deceased was a common prostitute, and that she kept a public house, were utterly irrelevant to any of the issues presented.

Defendant urges error, because, on direct examination by the State, the witness had testified that two or three days before the homicide was committed the accused had told him he had been endeavoring to get the deceased to consent to sexual intercourse with him, and that he intended to make one more effort. In view of this, it is urged that defendant should have been permitted to show the deceased was a lewd woman and would not probably have declined his solicitations in this regard.

There might be force in this objection if the bill of exceptions enlightened us as to the object or reasons of the State in putting in the evidence recited.

Was the State seeking to show a motive for the crime on part of the accused, viz.: that he killed the woman because she refused to yield to his embraces? If so, the bill should have so stated. It is absolutely silent on the point. It stops short at the words "and that he intended to make one more effort."

It may be the testimony was offered for the purpose of showing motive; defendant in his brief states it was; but outside of this statement in the brief (which is not the proper place to *inform* the Court of it) we are left to conjecture that such was the object of the State.

Conjecture does not warrant the serious action of reversing the verdict in this case. Being unapprised by the bill as to the object the State had in proving what it did, we cannot say the Judge erred in his ruling denying the defense the right to show the deceased was a lewd and abandoned woman.

The testimony was irrelevant, as the Judge ruled it was, unless offered to rebut or weaken evidence that had been allowed to go in to show motive. There is nothing in the bill to show defendant offered it for that purpose. *Non constat* that the Judge would have ruled the evidence sought to be admitted was "utterly irrelevant to any of the issues presented," had it been offered to rebut or weaken previous testimony adduced by the State to show motive.

From the third and last bill of exceptions we learn that a witness for the State testified, in substance, that on the morning following the homicide, certain parties were engaged in examining and tracing foot-prints leading from the house of the accused to that of the deceased and

State vs. Harris.

back again; that the accused, from a position in the rear of the gin house near the house of the deceased, witnessed this movement; and that, taking alarm, he fled, though no one as yet had charged him with the crime, running across the field in the direction of the spot some three miles away, where he was later come up with and arrested by parties who had gone in pursuit. It further informs us that this testimony was offered by the State as a circumstance—the flight of the accused—tending to show, with other circumstances, guilt, and that, to rebut and overcome the presumption arising from said alleged flight, defendant tendered certain witnesses, named, to show that, instead of fleeing, he (defendant) had gone to the place of residence of the witnesses offered and notified them of the fact that the woman had been killed by some one, and requested them to go to the place where her corpse lay and render such service as the occasion might require; that one of the parties thus requested did go; that it was at the place of residence of these witnesses, and just after informing them of the homicide and making the request alluded to, he (defendant) was arrested by the parties who had gone in pursuit of him; and that he intended further to prove by the witnesses what he had said to them at the time he called upon them—this to the end of showing that his act was not one of flight, but a mission of kindness, the parties thus notified being connections or friends of the deceased.

The State objected to this testimony and was sustained by the trial Judge, who recites at length the facts and incriminating circumstances leading up to the flight of the accused and his subsequent arrest, and tells us the accused, himself, was permitted to testify that his object in leaving the place where the killing occurred, while the officer conducting the inquest was engaged in tracing the tracks of the supposed murderer, was to notify the relatives of the deceased of her death, and the witnesses he offered were permitted to testify that he did tell them the deceased had been killed. But, besides this, the Judge informs us the accused undertook to testify that a relative of the deceased, who lived on the same place with the latter, and who was not summoned or offered as a witness, had, just prior to his alleged flight, requested him to go at once and notify the relatives who lived on the other and adjoining plantation; that this was objected to by the State as hearsay and as a self-serving declaration by the accused, and was excluded as such, as was, also, the testimony sought to be elicited from the witnesses the accused tendered as to the statements made to them by the accused

to the effect that he had been requested by the relative of the deceased to notify them of the latter's death.

It will be observed that the bill of exceptions under consideration names certain witnesses who were offered by the defense to prove certain alleged facts.

The inquiry, therefore, must be confined to a consideration of whether or not the Judge's ruling was correct in not permitting the witnesses thus named to give the testimony they were offered to give.

The Judge states, in his ruling, the accused undertook to testify that a relative of the deceased had, just prior to his alleged flight, requested him to go at once and notify the relatives who lived on the other plantation, and that on objection by the State, he declined to permit this statement to be made by the accused.

We are of the opinion this ruling was erroneous; that it was competent for the accused to give in evidence such statement; and if this had been included in the bill of exceptions, if the accused had been named in the bill as one of those witnesses called by the defense to testify and whose testimony had been excluded and against the exclusion of which the bill had been reserved, we would reverse this verdict and remand the case.

But the bill does not name the accused as one of those witnesses, to the exclusion of whose testimony it was taken. It names only Severin Sauville, Henry Butler and Susan Bush, and it was evidently reserved only to the exclusion of *their* testimony.

So, it must be held that no objection, legally presented, is before us relating to the Judge's ruling in regard to the testimony of the accused adverted to.

The ruling denying the defense the right claimed, to prove by the witnesses Sauville, Butler and Bush what the accused said to them at the time he came to where they were upon the other plantation, was correct. Whatever the accused said to them on that occasion is to be considered a self-serving declaration on his part and inadmissible.

In this ruling the learned Judge kept in line with the law governing and refusing the introduction by an accused person of his own declarations or statements not forming part of the *res gestae*. Wharton's Crim. Ev., 9th ed., Sections 690, 691; State vs. Thomas, 30 La. An. 600; State vs. Gonsoulin, 38 La. An. 459.

Judgement affirmed.

Mr. Justice Monroe dissents.

Rehearing refused.

Police Jury vs. Corporation of Mansura.

No. 14,323.

THE POLICE JURY OF THE PARISH OF AVOYELLES VS. THE CORPORATION
OF MANSURA.

107	201
p107	216
107	201
114	776
107	201
f116	766
107	201
f119	303

SYLLABUS.

1. A resolution of a police jury, authorizing its president to employ counsel to enjoin a municipal corporation from selling intoxicating liquors during the year 1902, is held to be sufficient authority, without further action by the jury, for the president to institute suit and stand in judgment therein.
2. If the people of a parish, by ballot, may vote liquor selling out of the parish, so that the prohibition is binding for twelve months on all the wards and cities and towns within the parish (and that is the law), such a vote taken throughout the parish every twelve months would continue prohibition in and throughout the parish indefinitely.
3. It is only where a parish fails to act in the way of repetition of the edict of prohibition, within twelve months of its former election, or of the beginning of the prohibitive period, that a town or city can take action to emancipate itself from the restraint put upon it by the parochial election.
4. Once a parish speaks for prohibition, its voice is paramount throughout its limits, binding on all, citizens and municipalities alike, and continues so for twelve months, and, if at or near the close of the twelve months, it speaks again for prohibition, it silences any contrary voice which, mean while, may have been spoken in towns or cities within its limits.

A PPEAL from the Fourteenth Judicial District, Parish of Avoyelles
—*Couvillon, J.*

Joseph Clifton Cappel and E. J. Joffiron, for Plaintiff, Appellee.

Adolph Vallery Coco, for Defendant, Appellant.

The opinion of the court was delivered by

BLANCHARD, J. In the year 1900 the Police Jury of the Parish of Avoyelles, acting under authority of Act No. 76 of 1884, submitted to the electors of the parish, at an election held for the purpose, the question of the sale, or prohibition of the sale, of intoxicating liquors in said parish.

Theretofore the sale of such liquors had been carried on in the parish.

The election ordinance provided that if the people voted against the continuance of their sale, the prohibition should begin from and after January 1st, 1901.

At the election which ensued, prohibition carried, and beginning with January 1st, 1901, licenses for drinking houses and shops were withheld.

In the autumn of 1901, action was taken by the authorities of Mansura, an incorporated village in the Parish of Avoyelles, to submit to the voters of that municipality the question of granting a municipal license to sell liquors within the corporation limits beginning January 1st, 1902. At the election held for the purpose twenty votes were cast out of a total of 35 registered voters in the town. All of the twenty were for authorizing the sale of liquor.

Subsequently, to-wit:—in December 1901, and before twelve months of prohibition, resulting from the previous parochial election, had expired, the Police Jury of the Parish again submitted, by proper ordinance, to the voters of the parish the question of continuance of prohibition *vel non* in the parish from and after January 1st, 1902.

At this election 817 votes in favor of prohibition were cast, and 240 against prohibition. Thereupon due proclamation was made of the result, viz:—that the people of the parish had legally decided to prohibit the sale of intoxicating liquors throughout the parish from and after January 1st, 1902.

Apprehending that, notwithstanding this second vote of the parish, the authorities of Mansura would issue licenses for the sale of liquors in that town for the year 1902, predicated their action in this regard on the election heretofore referred to as having been held in the town, the Police Jury, following the announcement of the result of the second parochial election, passed this resolution:—

Resolved that the President be and he is hereby authorized to employ counsel to enjoin the different corporations of the Parish from selling intoxicating liquors during the year 1902.

Whereupon the President of the Jury brought the present action against the town of Mansura to prohibit, by injunction, its officials from issuing licenses for the sale of liquor in the town for and during the year 1902.

Brushing aside as of no consequence certain minor matters that arose in the case, the real defense to the suit is found to be (1) want of authority in A. B. Irion, President of the Police Jury, to institute and prosecute the suit, or to stand in judgment for the Police Jury; (2) the election held in the town of Mansura in the fall of 1901, at

Police Jury vs. Corporation of Mansura.

which the sale of spirituous liquors was authorized in the town, was entitled to have full effect as against the parish for twelve months from the time from which such sale was authorized, to-wit:—January 1st, 1902.

The case was tried by jury, who returned a verdict in favor of the plaintiff, and from the judgment predicated thereon, defendant prosecutes this appeal.

I.

The resolution adopted by the Police Jury is sufficient authority for its President to institute this suit and stand in judgment therein for the parish.

It might have been fuller and more explicit, but its meaning is clear enough. It is not expected that an ordinance of a Police Jury will be drawn with that degree of preciseness and skill which characterizes acts adopted by higher legislative bodies.

This resolution authorized the President of the Jury to employ counsel for a specific purpose, to-wit:—to enjoin the incorporated towns in the parish from authorizing the sale of liquors in the year 1902.

This grant, then, by direct terms empowered the President to employ counsel to enjoin the towns from permitting liquors to be sold, and there followed from it, by necessary implication, the power to bring a suit, for only by suit, or process at law, could a writ of injunction be obtained.

The authority conferred to institute a suit involves and carries with it the power to stand in judgment in such suit. The proper party, under the law, in whose name a suit by a parish should be brought, when authority therefor is given by the Police Jury, is the President of the Jury, acting, as was the case here, for and on behalf of the jury.

But it is urged that, subsequent to the adoption of the resolution authorizing the President of the Jury to employ counsel to enjoin the towns, that official reported to the Jury he had engaged two lawyers who would undertake to represent the parish for a fee of four hundred dollars, and that a resolution offered by a member of the jury to appropriate that sum for the purpose was, on motion of another member, laid on the table.

The contention, in effect, is that this tabling of the proposition to appropriate money to fee the counsel employed, or proposed to be

employed, was tantamount to the withdrawal of the previous authority conferred to employ counsel.

We think not. The tabling of the resolution to appropriate four hundred dollars did not operate, under the general parliamentary law, the repeal of the preceding resolution authorizing the President to employ counsel.

Not only is repeal by implication not favored, but there was nothing in the action taken, refusing to appropriate the money, inconsistent, from a parliamentary standpoint, with the preceding resolution. It might have been that a majority of the Jury considered four hundred dollars too much for the service to be rendered by the attorneys, or considered that the authority conferred upon the President to employ counsel carried with it the power to agree with them in the matter of their fees, or considered that it were better to wait and see what service would be rendered, what the result of the suit or suits would be, and then pay on a *quantum meruit*.

II.

Under the second defense urged, the contention of the town of Mansura is, conceding that the parochial election held in 1900, establishing prohibition throughout the Parish beginning with January 1st, 1901, was binding upon the incorporated towns within the Parish, it was so binding for twelve months only, and that at the end of twelve months it was within the power of an incorporated town by a majority ballot of its voters to emancipate itself from the effect of the election and thereafter to authorize the sale of intoxicating liquors, and this election by the town, thus emancipating itself from the edict of prohibition pronounced anteriorly by the Parish, must be respected by the latter for twelve months. That is to say, the Parish having spoken in favor of prohibition, its voice is binding on the towns for one year, but, meanwhile, if, towards the close of the year, a town, by an election held within its limits, declares for liquor selling in the town, the Parish is without authority thereafter, *for the term of twelve months*, to gainsay this.

The Act of 1884 (No. 76) gives to the police juries of the parishes and to the municipal authorities of the towns and cities of the State the exclusive power to make such rules and regulations for the sale or prohibition of the sale of intoxicating liquors as they may deem advis-

able, and to grant licenses to, or withhold licenses from, drinking houses and shops within their limits, as a majority of the legal voters of any such parish, city or town may determine by ballot. The same authority, too, is extended to wards of a parish. The police jury of a parish may authorize a ward election to be held to take the sense of its voters on the question of prohibition *vel non*.

The act further directs that the election for which it makes provision shall be taken whenever deemed necessary by a police jury, or by the authorities of a town or city, "provided," says the act, "that said election shall not be held more than once a year."

Then follows a second *proviso* which is interpreted to mean (1) that whenever the majority of the votes cast in a ward, if only a ward election is held, shall be against granting licenses for the sale of liquors, said vote or decision is to govern and control throughout the ward, including within its grasp incorporated towns and cities situated within the limits of the ward; (2) that whenever the majority of the votes cast in a parish, if an election throughout the parish is held, shall be against granting licenses, said vote or decision is to govern and control throughout the parish, including within its grasp all the wards and incorporated cities and towns within the limits of the parish. And this shall be the case, concludes the act, (meaning the binding of the cities and towns), "as fully and completely as if said election had been held by authority of the towns or cities themselves."

The clear intention of the statute is that local option is conferred, first, upon those political subdivisions of the State called "parishes"; next, upon the subdivisions of a parish called "wards"; and, lastly, upon incorporated cities and towns within the parish or wards.

If the parish speaks as a whole in favor of prohibition, by means of an election held throughout its limits, its voice binds all the lesser political subdivisions, to-wit: the wards and municipalities, with this limitation, that twelve months after the parish shall have established prohibition a town or city, acting pursuant to ordinance adopted by its governing body, or a ward, acting pursuant to ordinance of the police jury calling an election for such ward, may vote to authorize liquor selling within its limits.

If a parish, as a whole, does not take action to establish prohibition, and a ward of the parish wishes to do so, the police jury may authorize such ward to hold an election, and if the vote be in favor of prohibition it binds the cities and towns within the limits of the ward, with the

limitation that twelve months after the ward shall thus have established prohibition, a town or city within its limits may vote to authorize liquor selling in the municipality.

If neither the parish as a whole, nor a ward as a whole, within which is an incorporated town, takes action to establish prohibition, such town, acting through its own officials, may hold an election, and if the vote be in favor of prohibition it holds good, in so far as the town authority extends, until the people of the town vote differently at an election, which is not to be held before twelve months, from the first election, expire.

No parish, nor ward, nor city, nor town, acting by way of an election on such matter, can hold a second election within the year of the first. Such is the meaning of the first *proviso* of the act which reads: "that said election shall not be held more than once a year."

If the people of a parish, by ballot, may vote liquor selling out of the parish, so that, as we have seen, the prohibition is binding for twelve months on all the wards and towns and cities within the parish, such a vote taken throughout the parish every twelve months would continue prohibition in and throughout the parish indefinitely.

It is only where a parish fails to act, in the way of repetition of the edict of prohibition, within twelve months of its former election, or of the beginning of the prohibition period, that a town or city can take action to emancipate itself from the restraint put upon it by the parochial election.

Once a parish speaks for prohibition its voice is paramount throughout its limits, binding on all, citizens and municipalities alike, and continues so for twelve months, and if at or near the close of the twelve months it speaks again for prohibition, it silences any contrary voice which, meanwhile, may have been spoken in towns or cities within its limits.

When prohibition is once established by vote in a parish, it continues until the people of the parish see fit to change it through the same means by which it was established, to-wit: by ballot, with the exception noted, viz.: that a ward, or an incorporated town or city within its limits may, by election held after twelve months, change it as to itself.

Practically, therefore, in order to maintain prohibition throughout a parish as an entirety, supposing the sentiment of the people to be that way, it is necessary for the police jury to submit the question to an election every twelve months.

And if the question be so submitted and prohibition be voted, it heads off or bars action by the towns looking to their emancipation therefrom.

That is the present case. Avoyelles Parish, in 1900, voted prohibition, to begin January 1st, 1901. Towards the end of 1901, it voted prohibition again, to begin January 1st, 1902. When it uttered its voice at this second election, it silenced and nullified the voice of the town of Mansura which had spoken in November, 1901, for liquor selling in that town beginning January 1st, 1902.

There is no warrant to be found in the law, nor any decision of this court, for the contention that when a town—a part of a parish—declares by ballot for the sale of intoxicating liquors, such action is binding on the parish as a whole for twelve months from the date of the town election.

The decisions relied on by defendant as sustaining this view, to-wit: *Citizens and Tax-payers vs. Board of Supervisors*, 49 La. Ann. 641; *Police Jury vs. Mansfield*, *Ib.*, 797; *State vs. Jackson*, 105 La. 438; and *Police Jury vs. Descant, Mayor*, *Ib.*, 512, do not do so. In none of those cases was the question here presented involved, and it is not considered that the views herein advanced are, in any way, in conflict with those there expressed.

The law, which declares that when a "majority of the votes cast in a parish, if an election has been held for the whole parish, shall be against granting licenses for the sale of intoxicating liquors, said vote or decision shall govern and control the action of any ward, incorporated town or city within the limits of said parish, as fully and completely as if said election had been held by authority of said town or city," fully sustains the pretensions of the plaintiff and the judgment appealed from, so holding, is affirmed.

BREAUX and MONROE, JJ., dissent.

No. 13,853.

SUCCESSION OF JAYME MAGI.

SYLLABUS.

ON MOTION TO DISMISS.

Where, in an action for partition by licitation among heirs, it appears that the property which is the subject of the partition is valued at more than \$2,000, and the only matter in dispute is as to the obligation of one of the heirs to collate a sum less than \$2,000, and he appeals from a judgment ordering him to collate, the appeal is properly taken to this court, and will not be dismissed, since the jurisdiction is determined, under Article 85 of the Constitution, by the amount of the "*fund to be distributed, whatever may be the amount therein claimed.*"

ON THE MERITS.

1. Books kept under the control and direction of a co-executor by a bookkeeper in the employ of the succession are admissible as a commencement of proof.
2. The preponderance of the testimony shows that the amount charged against the co-executor was correctly charged and that the amount was due.

A PPEAL from the Civil District Court, Parish of Orleans.—
Sommerville, J.

Gustave V. Soniat, for Widow Jayme Magi and for Widow Philibert Franchemer, Plaintiffs, Appellees.

Henry Chiapella, for Testamentary Executors of Fernand A. Magi, Defendants, Appellants.

Charles J. Theard, for S. V. Fonaris, Testamentary Executor of Succession of Jayme Magi, Defendant, Appellee.

Louis P. Bryant, for George Cassard, Dative Tutor of the Minors, Marietta and James Magi, Defendant, Appellees.

The Opinion, on Motion to Dismiss, was delivered by **MONROE, J.**

On the Merits was delivered by **BREAUX, J.**

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

MONROE, J. The executor of Jayme Magi filed his final account from which it appeared that, after payment of all debts, there would

Succession of Magi.

be a balance of property to be divided between Mrs. Josephine Magi, widow and legatee; Mrs. Marie Tranchemer, daughter; Marietta, and James, Magi, children of a predeceased son; and the succession of Fernand Magi, a son who survived the decedent and, dying subsequently, who is here represented by his executors. After the homologation of said account, Mrs. Magi and Mrs. Tranchemer filed a petition alleging that they desired a partition of said property, that they had received \$300, and \$210, respectively, and that Fernand Magi had received \$1,811, and that said amounts should be collated, and praying for an inventory and for judgment, etc. An inventory was accordingly taken, and, after hearing, there was judgment ordering the sale of the property included therein and a partition of the proceeds among the parties litigant in proportion to their respective interests, as determined by said judgment, and further ordering that the plaintiffs and the Succession of Fernand Magi collate the amounts as claimed in the petition. From this judgment, the executors of Fernand Magi have appealed, and the plaintiffs, through their counsel, move to dismiss said appeal.

In their application for the appeal, the executors say "there is "manifest error to the prejudice of the movers in, and they are "aggrieved by, the final judgment, herein rendered * * * against "them * * * in the sum of \$1,811, with accruing interest and "costs," etc., wherefore they have appealed.

The motion to dismiss, upon the other hand, is based on the ground, as stated in said motion, "that this court has no jurisdiction *ratione* "*materiae*, in this, that appellants have acquiesced, in their answer "and their appeal, in the entire demand of the plaintiffs except as to "the amount of \$1,811, which is the only amount or question in con- "troversy between appellants and appellees, which amount being less "than the lower limit of the jurisdiction of this Honorable Court, said "appeal should be dismissed."

According to the inventory, the property to be divided is valued at \$8,950.43, and this, we think, constitutes a *fund to be distributed* within the meaning of Article 85 of the Constitution, which reads: "The Supreme Court, except as hereinafter provided, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases "where the matter in dispute, or the fund to be distributed, whatever "may be the amount therein claimed, shall exceed two thousand dollars, exclusive of interest."

It is true that the appellants acquiesced in the demand for the partition, and in all other demands made by the plaintiffs, except that for the collation of \$1,811 by the Succession of Fernand Magi. And, by their failure and refusal to acquiesce in that respect, they are in the attitude of claiming \$1,811 from the fund, amounting to over \$8,000, which is to be distributed, whilst the other parties litigant are in the attitude of resisting said claim. Under these circumstances, we think it clear, according to the language of the Constitution, that, notwithstanding that "*the amount therein claimed*" is less than \$2,000, the jurisdiction of this court attaches, because the fund in which, or against which, the claim is made, exceeds that amount. *Renshaw vs. Stafford*, 34 Ann. 1140; *Hamilton vs. Creditors*, 51 Ann. 1043.

The motion to dismiss the appeal is, therefore, denied.

ON THE MERITS.

BREAUX, J. The executors of the succession of the late Fernand Magi appeal from the judgment of the District Court condemning them to collate the sum of eighteen hundred and eleven dollars to the succession of the late Jayme Magi, father of Fernand Magi.

A partition suit was brought by the widow of Jayme Magi; by Widow Tranchmen, a daughter of the late Jayme Magi, against the Succession of Fernand Magi, son of the late Jayme Magi, also against the children of the late Jayme Magi, a predeceased son of Jayme Magi, and against S. V. Fornaris, testamentary executor of the late Jayme Magi. The property was ordered to be sold to affect the partition.

The record discloses that some time prior to this suit for a partition, and a short time after the death of Fernand Magi, his co-executor of the Succession of Jayme Magi, prepared an account of administration of the succession on which he placed Fernand Magi as a debtor in the amount of one thousand eight hundred and eleven dollars. Notice of the filing of this account was given by the usual advertisement. In due time the account was homologated and the executor was directed to pay the funds.

The contention of the plaintiff in the partition proceedings is that the indebtedness of eighteen hundred and eleven dollars which they claim should be collated by taking less in the Succession of Jayme Magi, has been sufficiently shown to be due by the account before mentioned, rendered by Fornaris, executor of the Succession of Jayme

Succession of Magi.

Magi, for the reason that this account to which the executors of Fernand Magi were made parties was duly homologated without opposition.

They further contend that in addition to the effect to which this approved account is entitled in the present action for a partition, they examined witnesses and made it appear conclusively that the amount claimed is due as alleged.

The defendant in the partition proceedings sought to meet plaintiff's claim by urging that the homologated account in the Succession of Jayme Magi is not conclusive evidence of an indebtedness of eighteen hundred and eleven dollars, because collation does not enter into a final account of a testamentary executor and was not before the court, as that issue belongs properly to the proceedings in partition among the heirs and because the amount approved by judgment, as before mentioned, does not embrace collation in regard to which no evidence was offered of any claim to be collated; further that they were not cited.

We will not stop to consider the question growing out of the homologation of the first account and the weight to be given to the fact that it was homologated without opposition, and that it charged the late Fernand Magi with the amount before mentioned. We think that other testimony than the *res judicata*, predicated of these proceedings, amply sustain the claim, and in consequence we deem that it is not necessary to consider the judgment homologating the first account.

We are informed by the testimony that the late Jayme Magi owned a retail and wholesale cigar store, and that it was located in a leased building and that the lease had some time to run. Because of this unexpired lease, the heirs thought it best to continue the business until the end of the lease. The books were kept by the clerk—Holt-house. We understand that Fernand Magi more particularly had charge of the active operations of the store. A statement from these books shows that he was indebted in the amount claimed. But defendants urge that in admitting books of the store and considering them as evidence, it is carrying too far the principles laid down in the Code, that the books of merchants are good evidence against them.

These books were under the control of this executor and recorded an account of the business he had in charge. Mr. Fornaris says that

these books were, to some extent, kept by Fernand Magi while his father lived, and he also says in this connection that every item charged against Fernand Magi had previously been approved by him. In the last statement he is corroborated by the attorney of the succession as before stated.

While there was no partnership, there was a common interest among the heirs of the succession which, in part, was in charge of Fernand Magi. Decisions relating to partnership books, having some bearing, are: *Armistead vs. Sprig*, 1 Rob. 567; *Calder & Co. vs. Creditors*, 47 Ann. 346. Under these circumstances, these books were admissible as a commencement of proof.

Two hundred and eighty dollars of the amount of the one thousand eight hundred and eleven dollars are admitted by the defendant as due. With reference to the remainder, the executor repeats in his testimony that Fernand Magi took more than his salary of fifty dollars per month while administering the affairs of the succession. This witness was closely cross-examined by the learned counsel and in answer affirmed that which he had previously said in his examination in chief. In addition, Mr. Théard, attorney for the succession, said to Magi that he was indebted to the succession in a sum of about eighteen hundred and eleven dollars, which indebtedness Magi did not deny, but only expressed some concern because objection was urged to his taking any further sum from the cash of the succession.

Mr. Barnett, an accountant, examined the books in question and found the final debit to be in the sum before mentioned. The salary of Magi of fifty dollars a month, mentioned in argument and referred to several times in the evidence, does not appear to have been credited in the account showing a balance as before stated. But another book was kept of expenses which parties did not find and produce. If this book be found or other testimony showing that this sum is due, it would be a legitimate charge against the succession. With the testimony before us we would not be warranted in decreeing that it should be paid.

For the foregoing reasons, the judgment appealed from is affirmed.

No. 14,224.

TOWN OF CROWLEY VS. J. W. H. RUCKER.

SYLLABUS.

1. The town of Crowley is authorized to erect and maintain a public market-house, and has legal authority to enact reasonable ordinances requiring articles of food, intended for daily consumption, usually sold in town markets, to be vended at and in such market-house only, and to prescribe reasonable penalties in enforcement of such ordinances.
2. That part of Section 33 of Act 136 of 1898 providing for the inscription of ordinances adopted by municipalities in a book kept for the purpose, is held to be *directory* merely.

A PPEAL from Mayor's Court, Town of Crowley—*Campbell, Mayor*.

Thomas R. Smith and Hampden Story, for Plaintiff, Appellee.

Barry & McCain, for Defendant, Appellant.

 The opinion of the Court was delivered by

BLANCHARD, J. Defendant appeals from a sentence of the Mayor's Court condemning him to pay a fine of fifteen dollars.

Nowhere in the transcript do we find the specific charge preferred against him, but we gather from the briefs that he was prosecuted for violating a municipal ordinance forbidding the sale of certain perishable products and articles of consumption outside of the public market established for the purpose.

We find in the transcript two ordinances adopted by the municipality of Crowley. One of these prescribes that fresh meats, fish, vegetables, poultry, game, and other articles usually found for sale at markets, shall not be sold in the town outside of what is called the "Crowley Central Market," except as to certain limits of the town which are not to be effected by the ordinance; the other establishes the public market referred to and regulates the letting and leasing of the stalls and stands of the same, fixing the rates and charges, etc.

It, too, directs that fresh meats, poultry, fish, game, vegetables, etc., within the prescribed limits, shall be taken to and sold in the public market, with this modification, that vegetables, melons, celery, live poultry, small game, etc., produced in the town or vicinity and brought

to market by wagon, the owners of which have paid the regular market fees, may, by permit obtained, sell such articles on the streets between the hours of 10 o'clock A. M. and 5 o'clock P. M. of each day.

This ordinance, last referred to, covers much in the way of regulation of the market matters of the town, containing in all twenty-two articles.

We are not called upon, in determining the instant case, to consider each section or provision of the ordinance, with the view of ascertaining whether or not, in any part thereof, the town council may have transcended its powers. It may be the ordinance in part is valid and in part not valid. We do not decide this.

We are, for the present, concerned only with that part of the ordinance which is in *pari materia* with the ordinance first alluded to, for it is for violation of the first ordinance, and those parts of the second relating to the same subject matter, that the defendant stands convicted.

His answer calls in question the constitutionality and legality of both ordinances, and the appeal lies here because the constitutionality and legality of the fine imposed upon him is put at issue. Constitution, Art. 85.

The question presented admits no longer of any doubt. The charter of this corporation gives it the power:

To establish and maintain, and to provide for the government and regulation of markets, market-houses and places, and meat shops, and to collect a license tax therefrom and determine the amount of the license to be paid therefor; and when the municipality owns a market-house or houses, to fix the rental value thereof, and of stalls and booths therein.

Carrying this grant of authority into effect, the town Council of Crowley could erect or have erected a public market house, and could legally enact reasonable ordinances requiring the articles of food intended for daily consumption, usually sold in markets and hereinbefore enumerated, to be vended at and in such market house only, and could legally prescribe reasonable penalties in enforcement of such ordinances. We find nothing unreasonable in those parts of the ordinances in question, properly before the Court.

For a full review of this and kindred questions, see the opinion of Mr. Justice Monroe in *City of New Orleans vs. Faber*, 105 La. 209, and the authorities therein cited and quoted.

Police Jury vs. Corporation of Marksville.

We find that the ordinances attacked were properly promulgated by newspaper publication as the charter directs. The point made that no effect can be given to them because they do not appear to have been transcribed in an "Ordinance Book" provided for that purpose as required by Section 33 of Act 136 of 1898, is without force.

That part of the statute referred to, providing for the inscription of ordinances adopted by municipalities in a book kept for the purpose, is *directory* merely. Because a town council, or its clerk, should happen to neglect its or his duty in this respect, does not strike with nullity ordinances regularly adopted and otherwise legal.

There is no error in the judgment appealed from and the same is hereby affirmed.

No. 14,306.

THE POLICE JURY OF THE PARISH OF AVOYELLES VS. THE CORPORATION
OF MARKSVILLE.

SYLLABUS.

If a parish holds an election to take the sense of the voters therein on the question of granting or withholding licenses to sell intoxicating liquors, and the vote is in favor of prohibition, it is binding upon the incorporated towns in the parish for twelve months; and if, before the twelve months expire, the parish holds another election, and the vote is again in favor of prohibition, it continues to bind the towns, notwithstanding the latter, meanwhile, may have voted in favor of liquor selling.

A PPEAL from the Fourteenth Judicial District, Parish of Avoyelles
—*Couvillon, J.*

Joseph Clifton Cappel and *E. J. Joffron*, for Plaintiff, Appellant.

Tucker Horace Couvillon, for Defendant, Appellee.

The opinion of the Court was delivered by

BLANCHARD, J. The cause of action herein is identical with that set forth in plaintiff's petition in the case entitled *The Police Jury of the Parish of Avoyelles vs. The Corporation of Mansura*, No. 14,323 of the docket of this Court, a decision in which, favorable to plaintiff, is this day handed down.

Here, an exception of no cause of action was sustained by the trial Judge and the suit dismissed.

The opinion of this Court in the case mentioned above negatives the conclusions of law thus arrived at, and for the reasons there assigned the judgment herein must be reversed and the cause remanded.

It is, therefore, ordered that the judgment appealed from be annulled, avoided and reversed, and it is now adjudged and decreed that this cause be remanded with instructions to reinstate the same on the docket of the court *a qua* for further proceedings according to law, costs of appeal and those of the lower court pertaining to the exception filed, and trial thereof, be borne by defendant and appellee.

BREAUX and MONROE, JJ., dissent.

No. 14,274.

STATE OF LOUISIANA VS. ROBERT GONZALES, *alias* BLINKY BOB.

SYLLABUS.

The objection brought to the attention of the trial judge, by motion for new trial, that the bill of information informed the jury that there had been a previous trial and conviction and new trial granted, comes too late.

A PPEAL from the Criminal District Court, Parish of Orleans.—
Baker, J.

Walter Guion, Attorney General, and *J. Ward Gurley*, District Attorney, (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Henry O. Hollander, for Defendant, Appellant.

The opinion of the Court was delivered by

MONROE, J. Defendant was convicted of felonious entering in the night time, with intent to steal, and was sentenced to imprisonment at hard labor. He presents his case to this court on a bill of exceptions taken to the refusal of the judge *a quo* to grant a new trial for the several reasons set forth in the motion, of which, however, the only one relied on is stated as follows: "That the indorsement on the back of

the 'information,' showing that a prior conviction had been made, notwithstanding the fact that it also bore the indorsement of a new trial being granted to the accused, was such as to leave a tendency in the minds of the jury which could only redound to the disadvantage and prejudice and biased the minds of the jury against this accused."

The arguments, in the briefs filed, proceed upon the assumption that the bill of exceptions shows that the "information," with the objectionable indorsement on it, was placed in the hands of the jury, or submitted for their inspection; but this assumption, as may be seen from the foregoing excerpt, is not sustained by the fact. Taking it for granted, however, that the bill of information was placed in the hands of the jury when they retired to consider their verdict, that was the proper time for the defendant to have urged his objection. It came too late in the motion for new trial. "A defendant who does not object to illegal evidence, but permits it to go to the jury, can claim nothing afterwards, on the ground of its admission." Bishop's New Crim. Law, Vol. 1, Sec. 997.

Judgment affirmed.

No. 14,119.

JOSEPH BOURRIAQUE ET ALS. VS. JULES CHARLES.

SYLLABUS.

1. Art. 208 of the Civil Code is not prohibitive in terms, and must be taken and construed with another *in part materiae*, viz.: 209 of the Civil Code, regarding the modes of acknowledgment of natural children. Succession of Fortier, 51 A. 1585; Lange vs. Richard, 6 La. 570.
2. This view finds some support in 4 A. 305, cited with approval in 33 A. 1104. In the last cited case the court said of a decision holding views not entirely in accord with the first cited case, i. e., the case of Dugas vs. Caruthers, 6 A. 158, that it was the *dictum* of the organ, and not the opinion of the three judges composing the majority, with which the court in 33 A. 1104 did not agree.
3. In the 6th Annual case the natural brother and sister were acknowledged to some extent at least.
4. Between heirs acknowledged as required by Art. 209 C. C. and collateral heirs not acknowledged at all, the court holds that the former are entitled to inherit.

107	317
110	708

Bourriaque et als. vs. Charles.

A PPEAL from the Ninteenth Judicial District, Parish of Iberia—
Foster, J.

Broussard, Dulaney and Broussard, for Plaintiffs, Appellees.

Cammack and Muller and Louis Octave Hacker, for Defendant, Appellant.

The opinion of the court was delivered by

BREAUX, J. Plaintiffs sued to be recognized as heirs of Francois Bourriaque. They aver that they are his children and entitled to his succession. Francois Bourriaque died in the year 1889, leaving only natural children and natural brothers and sisters. A short time after his death an inventory of his estate was taken and his natural brothers and sisters went into possession of the property without an order placing them in possession.

Plaintiffs charge that the defendant Jules Charles, a natural brother, took possession of personal property of the deceased; that he has thirty acres of land, plaintiffs allege, he has cultivated from the time he went into possession in 1890, and plaintiffs further charge that the defendant is a trespasser.

Defendant sought to meet the issues tendered by plaintiff by pleading an exception of no right and no cause of action which was overruled. His answer sets forth that he and Francois Bourriaque are the sons of the same mother. This defendant claims to be the offspring of a union of his mother with Anthony, such unions as were usual in time of slavery, but that his half-brother Francois Bourriaque was the son of a white man. The parties, that is, the mother and father and their children are all colored, also the defendant here. The only white man in the ascending line was the father of Francois Bourriaque, the father of plaintiffs. This brother denied that Francois Bourriaque had children entitled to his property.

We notice the plaintiffs' and appellees' motion to dismiss made before this court on the ground of want of jurisdiction *ratione materiae* only to state that in our view the motion is without merit and is, therefore, overruled. The exception of no right of action was overruled and the exception of no cause of action was properly referred to the merits. Here the ruling affords no good ground of objection.

ON THE MERITS.

We do not take it that defendants seriously question the paternity of plaintiffs. If it were disputed it would not avail them much, for it abundantly appears from the evidence that they bore the name of the father, that he treated them as his children, sent them to school, and paid for their schooling. In talking, he frequently expressed concern for their future. The mother died when the children were young. They remained with the father and helped him in his daily work. This father in public and in private has acknowledged the plaintiffs as his children, has caused them to be taught. C. C. 209. The mother of these children was known as living with the father as his wife, though unmarried. C. C. 209. There never was a case of more complete acknowledgement under the article of the Civil Code cited above.

The contention of the defendant sets out in substance that plaintiffs are not acknowledged, because the acknowledgment was not made in form required.

Having considered the *status* of these children who were not acknowledged, it is true, as required by the articles of the Civil Code before a Notary Public or in the registry of birth, we are brought to a consideration of the claims of defendants who sue as natural brothers and one as the natural sister of the plaintiff's father.

They have never been acknowledged by any one, so far as the record discloses. The contention of the defendant is that the estate passes to the natural brothers and sisters; that the Civil Code confines its disposition upon the subject to the natural brother and sister, and this to the exclusion of the children who the defendants say are not acknowledged.

Under this theory, brothers and sisters would inherit from each other to the exclusion of the children, although they could not inherit from the mother much less from the father. It would follow if we were to hold that natural brothers and sisters can inherit in this case that they would inherit although entirely unacknowledged, while the children of the brother who have been acknowledged as required by the article to which we have before referred, would not inherit. Natural brothers and sisters would exclude the children of the brother. The order of inheritance would be reversed. Children would be excluded by brothers and sisters, in face of the article calling children to the inheritance of their natural father who has duly acknowledged them. C. C. 913.

Defendant particularly invokes the article of the Civil Code which provides "if the father and mother of the natural child died before him the estate of such natural child shall pass to his natural brothers and sisters or their descendants. C. C. 923. It does not follow that the natural brothers and sisters inherit to the exclusion of natural children if they are acknowledged." *Montegut vs. Bocas*, 42 A. 158.

The contention of defendant is that plaintiffs have not been acknowledged in the formal manner required by Art. 203 of the Civil Code. The method of acknowledgment is not exclusive of all other methods. No expression leads to the inference that it was the intention to restrict the proof of acknowledgement under the article before cited to its effect as to alimony; that the offspring is to be heard to prove acknowledgement, which is to confer upon him the right to recover alimony and nothing else.

The proof of acknowledgement has not been confined to Art. 203 C. C., and does not exclude the provision of Arts. 207 and 208 C. C. *Lange et al. vs. Richard*, 6 La. 570. Learned counsel for the defendant places reliance upon the case of *Dupre vs. Caruthers*, 6 A. 158, similar in most (but not all) respects to the case before us for decision. In the cited case the court said with reference to the *Lange* case cited above that "natural brothers and sisters were allowed to prove their maternal descent for the purpose of inheriting from each other under Art. 917 C. C., which prescribes that if the father and mother of the natural child died before him the estate of such natural child shall pass to the natural brothers and sisters or to their descendants."

"The same proof was allowed on behalf of the natural brother and sisters of the deceased in the present case."

In the case before us for decision the defendant could not prove under either of the articles last above cited that his mother ever acknowledged the father of plaintiff. In consequence there was not the least legal tie between them. One, in law, is stranger to the other.

Gathering the meaning from all the articles of the Civil Code treating this subject, we are constrained to hold that it was not the intention particularly to favor natural brothers and sisters to the detriment of the children of the deceased. As between the two, we are constrained to hold that the latter inherit. This is the extent of our decision. The defendant has not pleaded an outstanding right in the

Fuselier vs. St. Landry Parish.

State, and therefore, we strictly are concerned with the rights of the parties to this suit.

Before taking leave of this transcript, we will record with all emphasis that in so far as the 6th Ann holds a contrary view, we must concur with the decision rendered before that decision was rendered and with decisions rendered since, in which the natural children were recognized as entitled to inherit to the exclusion of the natural brothers and sisters.

We must decline to increase the amount allowed in reconvention for rent, as it does not appear to us that plaintiff is entitled to any increase.

It is ordered, adjudged, and decreed that the judgment appealed from be affirmed.

No. 14,166.

GUSTAVE FUSELIER VS. ST. LANDRY PARISH.

107	221
109	27
107	221
112	531

SYLLABUS.

1. Where a license levied under a parish ordinance, which was passed without the observance of some legal requirements, has been voluntarily paid, it can be recovered back on the ground of error only under exceptional circumstances. (*Multa fieri prohibentur quae si facta fuerint obtinent firmitatem.*)
2. The fact that the State has fixed State licenses for pursuing occupations for six months at one-half of that for pursuing them for one year, does not carry with it the obligation on the part of the Police Jury to follow the same rule in fixing the parish licenses to be paid by dealers in distilled, alcoholic or malt liquors.

A PPEAL from the Sixteenth Judicial District, Parish of St. Landry.
—Lewis, J.

Charles F. Garland and Henry L. Garland, Jun., for Plaintiff, Appellant.

Edward Benjamin DeBuisson, for Defendant, Appellee.

The opinion of the Court was delivered by

NICHOLS, C. J. The plaintiff has appealed from a judgment sustaining an exception of no cause of action filed to his demand and dismissing his suit. The following were his allegations:

Fuseller vs. St. Landry Parish.

That the Parish of St. Landry, through Marion L. Swords, Sheriff and ex-officio tax and license collector, illegally and without right collected, in *July, 1900*, from petitioner the sum of fifteen hundred dollars for a half year license of retail liquor dealer, from July to December, for the year 1900, and that in January, 1901, the said parish, through its said sheriff and ex-officio tax and license collector, illegally collected from petitioner the sum of two thousand dollars for the license of retail liquor dealer for the year 1901.

That the said Parish of St. Landry was without warrant of law or legal right to enforce the payment and collect said sums, for the reason that the Police Jury of the Parish of St. Landry had not legally imposed a license on the business of retail liquor dealer for the years 1900 and 1901.

That for the year 1900 the Police Jury of said Parish of St. Landry, at a regular meeting of said Police Jury, held on the 5th of December, 1899, made the budget of the estimate of expenditures of said parish for the year 1900, and at the same regular meeting, on same day and date, adopted the revenue and license ordinance of the said Parish of St. Landry for the year 1900, and that the said Police Jury of said parish, at a regular meeting held on the 5th of December, 1900, made the budget of the estimate of expenditures of said parish for the year 1901, and at the same regular meeting on same day and date adopted the license ordinance for said Parish of St. Landry for the year 1901, contrary to, in violation and utter disregard of the commands and requirements of the provisions of the law in the case made and provided.

That the provisions of the law relating to the imposition of taxes and licenses requires the Police Juries of the several parishes of the State to make the budget of the estimate of expenditures of said parishes for each year, and to publish said budget of expenditures in the official organ of each parish for full thirty days before adopting the revenue ordinances.

That the provisions of the law requiring the Police Juries to make a budget of estimate of expenditures for each year and publish same for full thirty days in the official organ of each respective parish before adopting the revenue ordinance imposing taxes and licenses are mandatory and must be strictly observed and rigidly complied with, and that the failure of the Police Jury of the Parish of St. Landry to

Fuseller vs. St. Landry Parish.

do so for the years 1900 and 1901 strikes with absolute nullity the actions taken by the said Police Jury in the premises.

That: he paid the said sums to the Sheriff and ex-officio tax and license collector of said Parish of St. Landry in error of fact and law, fully believing at the time of said payments that the said Police Jury of said Parish had complied with the provisions of the law and had legally imposed a license of two thousand dollars on the business of retail liquor dealer, and that petitioner only very recently discovered same after he had paid the said sums.

That at the time he paid the sum of fifteen hundred dollars for the half year license of 1900, then believing that the Police Jury of said Parish of St. Landry had legally imposed a license of two thousand dollars for the business of retail liquor dealer, he protested against the payment of said sum, contending that he had the right to obtain said license upon the payment of one thousand dollars, half of the amount of the full year license and that he paid the excess, viz.: five hundred dollars, under protest.

That the said Parish of St. Landry was without legal right to exact and demand more than half of the amount of the full year license and that the collection of the excess of five hundred dollars was without warrant of law and legal right.

That he is entitled to recover from the Parish of St. Landry the said amount, viz.: three thousand five hundred dollars paid by him to the Sheriff and ex-officio tax and license collector of the Parish of St. Landry during the years 1900 and 1901, in error of fact and law under the belief that the Police Jury of said Parish of St. Landry had legally imposed a license on the business of retail liquor dealer, which sums were illegally collected from petitioner by the said Sheriff and ex-officio tax and license collector of said Parish of St. Landry.

In the alternative, petitioner avers that, in the event that the court should decree that the Police Jury of said parish had sufficiently complied with the provisions of the law imposing the said licenses for the years 1900 and 1901, which is not admitted, but, on the contrary, specially denied, then in that event only, that he is entitled to recover said sum of five hundred dollars paid in excess for the half year license in the year 1900.

The premises considered, petitioner prays that the Police Jury of the Parish of St. Landry be duly cited to answer the demands herein made by 'serving copy' hereof on William F. Clopton, the president of the

Police Jury of the Parish of St. Landry; that after due service, legal delays and due hearing had, that petitioner have judgment against and recover from the Parish of St. Landry the sum of three thousand five hundred dollars, with legal interest from judicial demand until paid; in the alternative, in the event the court should decree that the Police Jury had sufficiently complied with the provisions of the law relative to the licenses aforesaid, which is not admitted, but is, on the contrary, strenuously denied, then, in that event only, petitioner prays for judgment against the said parish in the sum of five hundred dollars, as aforesaid, with legal interest from judicial demand until paid. And petitioner prays for all orders and decrees necessary in the premises, for costs and general relief.

Plaintiff's suit was filed on the 9th of August, 1901. He relies upon Articles 2133, 2301, 2302, 2303, 2304 and 2306 of the Civil Code, which declare that "Every payment presupposes a debt; what has been paid without having been due is subject to be reclaimed. That cannot be reclaimed which has been voluntarily given in discharge of a natural obligation." (C. C. 2133.) "That he who receives what is not due to him, whether he receives it through error or knowledge, obligates himself to restore it to him from whom he has received it." (C. C. 2301.) "That he who has paid, through mistake, believing himself a debtor, may reclaim what he has paid" (C. C. 2302); that "a thing not due is that which is paid on the supposition of an obligation which did not exist or from which a person is released" (C. C. 2304); and that "the payment from which he might have been relieved by an exception that would extinguish the debt affords ground for claiming restitution."

He urges that the licenses for which he paid, under the license ordinances of the Parish of St. Landry, for the years 1900 and 1901, were not due, for the reason that the license ordinances themselves were null and void; for the reason that the Police Jury of St. Landry had failed to comply with the provisions of Section 2745 of the Revised Statutes, which enacts that the Police Juries of the several parishes of the State, before they shall fix and decide on the amount of the taxes to be assessed for the current year, shall cause to be made out an estimate exhibiting the various items of expenditure, and shall cause the same to be published in the official newspaper of the parish, or, in the parishes where an official newspaper is not published, then by posting up written statements of such estimates in at least three of the most public places in such parishes, at least thirty full days before their

Fuseller vs. St. Landry Parish.

meeting to fix and decide on the amount of taxes to be assessed as aforesaid. He contends that this section is mandatory and that it must be strictly and rigidly complied with, and he refers the court to *James vs. City*, 19 Ann. 190; *Home Mutual Ins. Co. vs. City of New Orleans*, 20 Ann. 447; *State ex rel. Boatroue vs. Judge*, 30 Ann. 420; *State ex rel. Neugass vs. City*, 38 Ann. 121; *Wilson vs. Anderson*, 28 Ann. 261; *Parish of Lincoln vs. Huey*, 30 Ann. 1244; *Police Jury vs. Bouanchaud*, 51 Ann. 866; *State vs. Lockett*, 52 Ann. 1620, and *Constant et al. vs. Parish of East Carroll*, 105 La. 286; *Tucker on the Constitution*, Vol. 1, p. 75. He insists that there is no natural obligation to pay a license where none is either legally or constitutionally imposed; that the obligation to pay a license is statutory and falls with the statute; that payment in error is a sufficient basis for recovery without allegations of proof that a suit for prosecution had been entered against him.

In support of his prayer for alternative relief he submits that Article 229 of the Constitution of 1898 only grants the power to Police Juries to impose on retail dealers a greater license tax than that imposed by the Legislature for State purposes. That the grant of power is limited to that only. Having been granted by the Constitution the sole power to impose a license tax larger than that imposed by the Legislature, it cannot pass any laws in contravention of State laws and of the rights thereunder granted. That State law granting the right to take out a license upon payment of half of the whole year's license, he was entitled to have obtained a license upon the payment of \$1,000. This branch of plaintiff's claim is based upon the provisions of Section 18 of Act No. 171 of 1898 (the State License Act of that year), which, after classifying the different occupations on which licenses are to be paid and fixing the amount of the licenses, declares by way of proviso, "that any person commencing business after the first of July, peddlers excepted, shall pay one-half of the rates."

The license ordinances of St. Landry are not in the record, but we infer from plaintiff's complaint that the parish imposed a license of two thousand dollars for selling liquor for a year, and fifteen hundred dollars, instead of one thousand dollars, for a half year.

The defendant, on the other hand, refers the court to Article 2303 of the Civil Code, which makes it a condition of the right to recover an amount of money *voluntarily* paid, but paid through error, that "the thing paid should not be due in any manner, either civilly or naturally; that a natural obligation to pay will be sufficient to prevent recovery."

It maintains that money paid for taxes in pursuance of laws illegally or informally enacted or ordained cannot be recovered back in this State, on the ground that the payment was made in error, because there was a natural obligation on the part of the tax debtor to make the payment. Counsel cite, as sustaining the position, *Campbell vs. New Orleans*, 12 Ann. 34; *Bank vs. New Orleans*, 12 Ann. 421; *Factors and Traders' Insurance Company vs. New Orleans*, 25 Ann. 454; Civil Code 1757, 1758, 1759, 2302, 2303 and Article 18 of the Code of Practice. He contends that the coercion or duress which will render a payment of taxes involuntary must in general consist of some actual or threatened exercise of power possessed or believed to be possessed by the party exacting or receiving the payment over the person or the property of another from which the latter has no means or reasonable means of immediate relief except by payment, and cites *Dillon on Municipal Corporation*, 4th Ed., Sec. 943; *Union Pac. R. R. Co. vs. Dodge Co. Commissioners*, 98 U. S. 541, and *Factors and Traders Ins. Co. vs. New Orleans*, 25 Ann. 459.

Referring in his brief to the claim made alternatively by the plaintiff that the parish was without authority to exact for pursuing the business of selling liquor for half a year more *than one-half* of that exacted for the *whole year*, defendant's counsel, after copying Article 229 of the Constitution, which provides that "no political corporation shall impose a greater license tax than is imposed by the General Assembly for State purposes. This restriction shall not apply to dealers in distilled alcoholic or malt liquors," says in his brief: "The prohibition contained in the first sentence quoted had, by the force and the effect of the exception contained in the exception, no application to dealers in distilled liquors. Plaintiff's complaint is that Police Juries have no right to exact from persons commencing business after July 1st more than half the amount levied for the whole year. This complaint is evidently founded upon the proviso of Section 18 of Act No. 171 of 1898, which reads as follows:

"Provided, that any person commencing business after the 1st of July, peddlers excepted, shall pay one-half of the above rates." The proviso itself does not purport to deal with the rights or powers of municipal corporations. It has reference exclusively to State licenses and only affects municipal corporations through and by virtue of Article 229 of the Constitution. If the prohibition contained in said article against the right of any municipal corporation to levy a greater

license tax than is levied by the General Assembly for State purposes has no application to dealers in distilled alcoholic or malt liquors, neither has the above quoted proviso."

Referring to the protest made by plaintiff at the time of his paying the fifteen hundred dollars as a license for pursuing his business for six months, counsel makes the following quotation from Dillon on Municipal Corporations, 4th Ed., Sec. 943:

"The coercion or duress which will render a payment of taxes involuntary must in general consist of some actual or threatened exercise of power possessed or believed to be possessed by the party exacting or receiving the payment, over the person or property of another from which the latter has no other means or reasonable means of immediate relief, except payment." (See Sections 940 and 949.)

In the case at bar the only protest made by the plaintiff was as to the excess of "five hundred dollars" on the claims made for the license for six months. Plaintiff conceded the right of the parish to claim one thousand dollars for that license.

We may here state that if the parish was authorized to demand at that time any license whatever, it was entitled to demand, as it did, fifteen hundred dollars. The position taken by the parish on that subject is legally correct.

The claim made by the plaintiff on the first branch of the case is not that the Parish of St. Landry did not adopt a budget for the years 1900 and 1901, but that the license ordinances for those years were adopted prematurely; that is to say, before thirty days had elapsed after the date of the publication of the budgets. It is claimed that the ordinances so prematurely adopted are absolutely null and void and of no effect, as the provisions of Article 2745 of the Revised Statutes on that subject are mandatory.

If the plaintiff's proposition be true and he be entitled to recover the amount of the licenses paid by him under the circumstances of this case, it is evident that every other person who has paid parish taxes under the ordinances can do likewise, and the financial affairs of the parish be entirely upset for their benefit. On the strength of the silence and acquiescence of the taxpayers in the legality of the ordinances, debts have been created and paid which, but for such acquiescence, would not have been created and paid.

If the Parish of St. Landry, with its limited power of taxation, be forced to refund to the taxpayers of the parish the taxes received and

disbursed by it, presumably for the good of its people, it will be placed in a position which we do not think the lawmaker could have possibly contemplated as the result of a mere failure to enact the ordinances at the precise time designated by the statute.

This far-reaching effect which it is claimed should be given to a non-compliance with the exact terms of the statute is based upon the theory that the purpose of the requirement referred to was intended to enable the taxpayers to bring moral suasion to bear upon the Police Juries in fixing the amount of licenses or taxes. We cannot believe, as we have said, that the General Assembly ever intended such deplorable and disproportionate consequences to follow from a mere irregularity or informality which could be easily reached and remedied in other ways. In *Campbell vs. The City of New Orleans*, 12 Ann. 34, this court held that, where a tax levied under a municipal ordinance passed without legal formalities has been voluntarily paid, it cannot be recovered back on the ground of error.

That there being no law exempting the plaintiff's property from taxation for the purposes contemplated by the ordinance, he was under a natural obligation to contribute his quota to the support of the municipal corporation from which he derived protection. That no suit will lie to recover what is paid or given in compliance with a natural obligation. This conclusion was evidently reached by the court after mature deliberation and discussion, as Mr. Justice Buchanan dissented upon the express ground that there was no legal obligation to pay a tax illegally imposed.

In the body of the opinion the court said: "It did not appear that the tax collector had any compulsory warrant or execution in his hands against the plaintiff." What the informality in the tax ordinance in that case was, does not appear, but the court declared that the property taxed was not *exempted* from payment of the tax. Proceeding, the court said: "Although it may be true that a perfect obligation to pay did not arise, for want of regularity in the ordinance imposing the tax, still, as the plaintiff voluntarily paid, without protest, a sum naturally due, he cannot now reclaim it on the plea of error." Such obligations as the law has rendered invalid for want of certain forms or for some reason of general policy, but which are not in themselves immoral or unjust, form one class of natural obligations. Civil Code (1751, No. 1).

"The municipal authorities were virtually the plaintiff's agents for the purpose of levying such an assessment upon his taxable property as would defray his share of the necessary expense of police, etc. They levied the assessment upon property legally liable to taxation, but in doing so neglected to pursue certain prescribed forms, a neglect which would have rendered the plaintiff's obligation to pay invalid *in foro legis*, if he had raised the objection in time and in the proper manner."

The syllabus of *Bank of New Orleans vs. City of New Orleans*, 12 Ann. 424, is to the effect that where payment has been made of a tax which might have been resisted at law, the money cannot be recovered, if the tax is on property, whether exempt from general taxation or not, and the assessment is rather a toll or contribution, and the party paying has derived a direct benefit from the improvements made by the imposition of the tax or assessment, nor where the property was liable to taxation and the illegality of the tax depends upon some informality in the passage of the law establishing the tax.

In *Factors & Traders Insurance Co. vs. The City of New Orleans*, 25th Ann. 454, the same question was submitted to this court, and the principles announced in *Campbell vs. New Orleans* were reaffirmed. The court reviewed at some length the opinion delivered in that case, saying: "In that case, as in this, Campbell paid to the tax collector a certain sum of money as his city tax for the year 1850. In that case, as in this, it did not appear that the money was paid under any compulsory warrant or execution. It is alleged here that if plaintiffs had not paid they incurred the risk of having their place of business closed, but it is not shown that they had been condemned to pay by any authority. In that case, as in this, there was a judgment in a suit between the city and another party defendant declaring that the ordinance under which the tax was proposed to be collected of him was unconstitutional." * * * The court held in that case that, although the municipal authorities had neglected, in enacting the ordinance, to pursue certain prescribed forms, a neglect which would have rendered the plaintiff's obligation to pay invalid *in foro legis*, if he had raised the objection in time and in the proper manner," yet having voluntarily paid the tax, it could not recover.

The court noticed the fact that "in one particular the controversy between Campbell and the city differed from that then before it," in this, that, whereas Campbell paid without objection or protest and sought only to recover after it had been decided in a controversy be-

tween another person and the city that the ordinance was unconstitutional, in the case before it the plaintiff before making the last payment expressly stipulated with the city treasurer, to whom the money was paid, that it should be returned in case the court should determine the case of the city against another insurance company in a certain sense, but in reference to this it said: "Still there was not any coercion on the part of the city under force of which this payment was made. There was not execution in the hands of the Sheriff by which their property could have been seized in case they did not pay.

"They paid, not because they were forced to pay, but because they chose to pay. They aver, it is true, that they were threatened with the close of their place of business in case they did not pay, but their relief from this apprehension was not by paying—on the contrary, it was by resisting paying, as the company did in the case upon the decision of which they were content to rest their obligation. The stipulation with the treasurer amounted to nothing, as it was not shown that he had any authority to make the contract on the part of the city which plaintiff had set up. If he was not able to bind the city, the stipulation he made was not obligatory. The majority of the court held that there was unquestionably a natural obligation on the part of the plaintiff to pay its *pro rata* of taxes, and rejected his demand. In the present case the plaintiff paid voluntarily the license demanded, except for the sum of five hundred dollars, and the objection which he urged to that particular portion of the license was one which we have just held was not well grounded.

Had the plaintiff promptly urged the objections which he now advances against the ordinances *non constat* but that the Police Jury would not have immediately re-enacted them so as to make their action exactly conform to the law. He did nothing of the kind. By payment he avoided the injunction which probably would have been taken, preventing him from pursuing his business without a license, and which would have determined at once the issues which he now seeks to raise, placed himself in a position which he would otherwise not have occupied, reaped all the benefits to himself resulting from that position by pursuing his business without interruption for over a year and a half, and now, after the advantages which he derived from following the course he did can no longer be taken from him

seeks to repudiate the instrumentality or means through which alone he was able to obtain them.

We say, as did the court in the Campbell case, and that of the Factors and Traders Insurance Company, that if the plaintiff had any objections to urge, they should have been urged at a proper time and in a proper manner. He cannot for his individual benefit throw the finances of the parish into inextricable confusion; he is estopped at this late day, after so many rights have accrued on the strength of his acquiescence and that of the other taxpayers of the parish, from disturbing the present situation. *Mulla fieri prohibentur quae si facta fuerint obtinent firmitatem.*

Wilson vs. Anderson, 28 Ann. 261; Parish of Lincoln vs. Huey, 30 Ann. 1244, and Police Jury vs. Bouanchaud, 51 Ann. 866, were cases where the defendant was resisting payment of a license and not seeking to recover money already paid for obtaining one. State vs. Lockett, 52 Ann. 1620, has no particular bearing in the present litigation. Constant Benjamin & Co. vs. Parish of East Carroll, 105 La. 286, was a case to recover back money paid for a license, but the facts of the case are unlike those in the one before us, as will be seen by reading the opinion. The money was paid under protest and under circumstances entirely different from those disclosed by the pleadings here.

We think the judgment appealed from was correct, and it is hereby affirmed.

Rehearing refused.

No. 13,728.

C. S. BURT CO. ET ALS., LIMITED, VS. THE CASEY & HEDGES MANUFACTURING COMPANY.

SYLLABUS.

1. Whilst the plaintiff did not, as did the defendant in one of its letters, use a word which should not have been used, it was equally as aggressive in its methods to uphold its business. It chose, without first going to law, to charge the defendant with having infringed its rights under the patent it holds.
2. The defendant sought to retaliate by writing to those with whom it dealt or sought to deal.

107	231
119	272
107	231
123	263

3. Plaintiff brought suit in the United States Court against the defendant, and defendant against the plaintiff. Each charged the other with fraud against the patent laws. The question as to who is the offending party and who has committed the damages will have to await the determination of the issue as to who was the infringer on the other's patent.
4. Each pleads that the other is the infringer in justification of the letters he has written. That issue can be determined at the same time, or after it will have been determined who has violated the patent laws.
5. One who seeks damages growing out of an alleged libel must, in proper issue, show that he himself is not at fault.

A PPEAL from the Civil District Court, Parish of Orleans.—
Ellis, J.

Lazarus & Luce, for Plaintiffs, Appellants.

Lawrence O'Donnell, for Defendant, Appellee.

The opinion of the court was delivered by

BREAUX, J. Plaintiff sues the defendant for libel and the damages it avers it, in consequence, has suffered.

Plaintiff has, for a number of years, been engaged in the business of supplying planters with machinery. It is also assignee of the Gordon Hollow Blast patent in the territory in which it carries on its business as dealer in machinery. This firm has the exclusive right to manufacture and sell the Gordon Hollow Blast machines in Louisiana, and other territory mentioned in the deed of transfer to it. It has established a large business, and has the confidence of the business community in which it has its domicile.

It complains particularly of a letter written by defendant, in which it is referred to in terms anything but complimentary, and addressed to a sugar planter to whom each, plaintiff and defendant, was seeking to sell a bagasse burner.

In the course of the competition which arose between them in offering their blast grates and burners to the planters, defendants, in several letters, sought to belittle the plaintiff and used one or more offensive words in these letters calculated to irritate, and even, perhaps, injure plaintiff in the opinion of its customers. Defendant particularly charged the plaintiff in these letters with seeking to create the impression that they were patentees of the Hollow Blast, when they were not.

Defendant brought suit in the United States Court charging plaintiff with having infringed upon its rights as patentee of the furnace contrivance in question, and asked for a perpetual injunction restraining plaintiff from selling or disposing of hollow blast grates which infringed upon defendant's patent. In order not to be outdone by the defendant, plaintiff also instituted suit in the same court against the defendant, and it also claimed that defendant was infringing upon its rights as the assignee of a hollow blast patent. These suits are pending in the court before which they have been brought, and nothing has been done, so far as the record here discloses, to bring the issues to a close. In the pleadings before the United States Court, each lauds his patent, and each charges the other with willful violation of his rights and with fraud. Each claims damages for infringement of patent.

The question of legality and validity of the patents and the extent one may have infringed upon the other being before the United States Court, this court, it follows, is only called upon to determine whether or not patents have been issued; also to decide whether defendant has been guilty of committing a libel upon the good name of the plaintiff.

Years ago, plaintiff and defendant dealt with each other in business. They brought their business relations to an end and there remained no good feeling between them afterwards. Plaintiff conceived the idea that the purpose of the defendant was to compel it to seek other fields in which to carry on its business, while defendant was not slow in arriving at the conclusion that plaintiff was seeking to gain an undue advantage over it in the business of selling boilers, bagasse burners, and other sugar plantation contrivances. The field in which they were engaged in business, the record shows, was inviting. There was ample demand and fair return was to be had. The result was, in seeking business, each conceived that it had grounds to complain, which were freely set forth in letters to customers.

Plaintiff having obtained several of these letters, which were aggressive enough in tone to irritate and even excite, brought this suit. Whilst the defendant, on the other hand, having succeeded in getting a number of letters containing language which it contends is equally as injurious, introduced them in evidence on the trial.

We will dwell for a moment upon the particulars of the case. Plaintiff complains of a letter to which we have already referred, addressed by the defendant to some of their acquaintances among the

sugar planters, in which it took particular pains to say to them that it (Burt & Co.) had never been allowed a patent upon a bagasse burner of any kind.

It appears that Burt & Co. were licensees and assignees, and, as explained by the company, it was scarcely fair to urge that they were not patentees, however true it was. Plaintiff also complains of defendant's assertions that it was a manufacturer's agent in a small way, and that they had no stock of goods; that it resorted to fraudulent methods and charged it with having committed a fraud and offense upon the patent laws.

These charges were unfounded and should not have been made. But when competition for business is sharp, as it was, we infer, in this instance, many things are said and done which were better not said and done.

When it results that a party has been injured in his good name and reputation, he is surely entitled to damages. In this suit, however, it appears that plaintiff also wrote letters and made assertions against defendant and its business. The first letter, charging defendant with infringing upon plaintiff's patent, was written by it prior to any attack having been made by defendant on plaintiff's business.

Plaintiff, as early in the history of these troubles as the year 1896, instead of resorting to law, sought to warn a sugar planter against buying one of defendant's bagasse burners, because plaintiff said it was an infringement upon the patent it held. Plaintiff advances the argument in its defense that years having elapsed since that letter was written, it should not be taken account of in the controversy. We do not consider that this letter should have any great importance except as indicating when the business war began, and that plaintiff was the first to open the attack.

In February and March, 1898, prior to the letters written by the defendant, of which plaintiff particularly complains, plaintiff caused a number of letters to be written to parties with whom defendant was negotiating, notifying them that if they purchased from the defendant proceedings would be instituted against them in damages. This, the record shows, interfered, to some extent, with the defendant's business, and checked its collections of amounts due on their machines.

True, plaintiff, in its letters, did not transcend the bounds of propriety by using harsh words, but the purpose was about the same which the defendant had in view. Before it is determined who is infringing on the rights of the other, if there was an infringement, a question

now pending for decision before the United States Court, it would be difficult to determine who is most at fault. *Mielly vs. Soule*, 49 Ann. 904.

In this contention for business and in the conflict of words as written, we find it difficult at this time to assess damages. We take as well settled that to sustain an action for libel, one must prove damages, or the mode followed must be such as to create a presumption that the complainant has been injured, and that his business has suffered in the esteem of its friends, or of those with whom it deals, loss in business, or character, in consequence, and, further, that plaintiff has sought not to go to the extreme in retaliating against the one charged with libel.

We have discovered nothing of the kind in this case. True, in one of the letters of the defendant, a word was used that should not have been used. Business competition does not justify its use. Defendant could well have introduced its machines and sustained whatever good qualities its machines may have without resorting to an undeserved epithet against the plaintiff, yet we do not think, under the circumstances here, there is ground enough for damages. The epithet in question, has different shades of meaning. Considered in the most favorable light, under the circumstances in which it is used, it affords no good ground to allow damages. The law lends its protection to every person, natural, or juridical, to shield its good name, not to the extent, however, of protecting one and condemning the other when the complainant has itself been at times as intemperate in its seeking to maintain the vantage ground it had perhaps gained in its business.

Our learned brother of the District Court, in a carefully written opinion, expressed similar views with which we agree, and we insert here a list of decisions cited by him in support of the view that "one who is at fault cannot recover civil damages from another who has retaliated in kind, although the latter, in law, was not justifiable, and this, in spite of the truism that one wrong does not justify another." *Barrow vs. Landry*, 15th Ann. 681; *Johns vs. Brinker*, 30 Ann. 241; *Vernon vs. Bankston*, 28th Ann. 710; *Young vs. Bridges*, 34th Ann. 333; *Ludeling vs. Stubbs*, 34 Ann. 940; *Bigney vs. Van Benthuyseu*, 36th Ann. 38; *Goldberg vs. Dobberton*, 46 Ann. 1308; *Mihojovich vs. Bodechtel*, 48 Ann. 618.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from is affirmed.

Rehearing refused.

No. 13,749.

107 236
112 857
112 858

BARRY BROS. ET ALS. VS. AMERICAN WHITE LEAD AND COLOR WORKS.

SYLLABUS.

1. In probate proceedings all evidence in support of a judgment must appear of record; and in this respect insolvency proceedings are assimilated to probate proceedings. Hence, a judgment homologating the quarterly statements or the final account of a receiver will be set aside on appeal, unless supported by evidence of record.
2. *Es parte* affidavits are not evidence.
3. Act 159 of 1898 is imperative against the approving of the quarterly statement of a receiver until ten days after notice of the filing of such statement shall have been entered in the receivership order book, a book which under provision of the same act must be kept by the Clerk of Court; hence, a judgment approving a receiver's quarterly statement, without such entry having been made, must be set aside.
4. The law providing for the fixing of the fees of receivers is Act 159 of 1898. Where the receivership is of a going concern, the fees are the same as those of syndics under Section 1818 of the Revised Statutes. Where the receivership is not of a going concern, the fees are fixed by the judge at his discretion.
5. The law fixing the fees of auctioneers is Act 104 of 1896. By this law these fees are fixed as follows: On sales of immovables, two per cent. on the first ten thousand dollars of the price and one per cent. on the excess; on sales of movables, not more than five per cent. of the price, at the discretion of the court. Where the immovables and the movables are not sold separately, but in block, the appraisement of the property must be taken for basis of computation.
6. A pledgee of bonds authorized by the act of pledge to sell the bonds, with or without notice, at public or private sale, and at such sale to become the purchaser, may thus sell the bonds and become the purchaser of them. In this case the bonds were sold after full notice and at fair price.
7. Where the immovables and the movables of an insolvency are sold confusedly in block, and the property thus sold was affected by mortgages and privileges, the court will apportion the price equitably among the mortgage and privilege creditors. In this case the appraisement of the property is adopted as the basis of the apportionment.
8. Where receivers permit the purchaser at the judicial sale of the immovable property of the estate to pay the price of the sale direct to a creditor holding a mortgage on said property they do so without right and at their peril; and in the settlement of the estate the said price will be dealt with as if collected by the receivers.
9. Where a case on homologation of final tableau is fixed for trial before the expiration of the ten days public notice of the filing of the tableau, and after said fixing an opposition is filed, the fixing will not be binding on the opponent unless he is notified thereof by posting as required by rule of court. But, where such fixing was for the 28th of September, and on that day the trial is postponed to the 15th of October, and is again postponed to the

Barry Bros. et als. vs. White Lead and Color Works.

29th of October, and the attorney for the opponent is present at the latter postponement and verbally consents thereto, the said opponent cannot, at the calling of the case on the 29th of October, claim a continuance because of his having not been notified by posting, or because his former attorney no longer represents him, and his new attorney has but a few days before come into the case. Continuances are necessarily in great measure within the discretion of the trial judge.

A PPEAL from the Civil District Court, Parish of Orleans.—
King, J.

—————
Dinkelspiel & Hart, for Receivers of the Defendants, Appellees.

—————
Thomas J. Duggan and *Theodore Cotonio*, for W. J. Martinez, Opponent, Appellant.

—————
Benjamin Rice Forman, for Hills & Wright Linseed Oil Co., Ltd., Creditor, Opponent, Appellant.

—————
The opinion of the Court was delivered by

PROVOSTY, J. This is an appeal from the judgments approving two quarterly statements of the receivers, and also from a judgment homologating, in so far as not opposed, the final account of the receivers; and, lastly, from a judgment rejecting the appellant's opposition to the final account of the receivers and homologating a second time said account.

Complaint is made that the two quarterly statements were approved without a notice of their filing having been entered on the Receivership Order Book, which, by Section 8 of Act 159 of 1898, the Clerk of Court is required to keep. If said notice was not so entered, the approvals must be set aside. Section 9 of said Act 159 is imperative that "no statement shall be approved by the court until ten days after entry of such notice" in the order book. The receivers do not say that the notice was so entered, and we find in the record no evidence that it was. The judgments must, therefore, be set aside. We considered whether we might not presume, in the absence of proof to the contrary, that such entry had been made; ordinarily the Appellate Court presumes that the judgment appealed from was supported by proper evidence; but this presumption does not obtain in probate proceedings, and insolvency proceedings are assimilated to probate in

respect to the necessity for all evidence to appear of record. *Bargebur vs. Their Creditors*, 4 N. S. 620; *Pelican Saw Mill Co., in Liquidation*, 48th Ann. 716.

For the same reason of absence of evidence to support it, the judgment of October 5, 1900, homologating the final account, in so far as not opposed, must be set aside. The only proof of the account was by *ex parte* affidavit. *Ex parte* affidavits are not testimony. They cannot serve to support the account on an issue joined by default any more than they could serve on an issue joined by opposition.

Pending the application for the appointment of receivers, the president of the insolvent concern resigned, and the opponent, Martinez, who was the vice-president, acted as president for a space of twenty-two days. He claims that he is entitled to receive for this service the same pay that the president would have gotten if he had not resigned. He is not entitled to this pay by charter or by resolution. Is he entitled to it on the principle that the laborer is worthy of his hire? The evidence shows that the amount of work done by him was insignificant. The secretary was asked, on the witness stand: "What did he do?" and he answered: "He opened the mails and referred everything to me." Opponent is a dealer in shoes, and knows nothing about the manufacturing, etc., of paints; whereas, the salary he claims had been allowed to the president in view of the fact of the latter's knowledge and skill as a practical manufacturer of paints. We think the amount of work done by opponent was not more than he might well do in his capacity of vice-president without pay.

We are not told and fail to see on what ground is based the contention that the opponent's two thousand five hundred dollars claim is privileged. It is a plain, ordinary debt due by the estate on a promissory note.

The law providing for the fixing of the fees of receivers is Section 6 of Act 159 of 1898. It provides that "such receivers shall receive the same compensation as syndics of insolvents, whenever the power is not conferred upon him to conduct the business of the corporation as a going concern; otherwise his compensation shall be fixed at such reasonable sum as the nature of the case justifies." If this estate was a going concern, the receivers were entitled to charge, under Section 1818, Revised Statutes, which is the law fixing the commission of syndics of insolvents, five per cent. on the net amount of money received by them. This would make a sum exceeding the two thousand

dollars allowed, the receivers having handled over eighty thousand dollars. If the estate was not a going concern, the fixing of the fee was a matter within the discretion of the court; and we think the judge *a quo*, in this instance, exercised that discretion wisely. He allowed a commission of two thousand dollars. The administration lasted over eight months, and was onerous, and involved great responsibility.

The opposition to the fees of the lawyers, the notary and the appraisers, was not pressed in the oral argument, and in the briefs we are not advised of the reasons why these fees are considered to be excessive. The testimony is to the effect that they are fair, and the judge *a quo* approved them. We see no reason for disturbing his judgment.

Under Act 104 of 1896, the auctioneer is entitled, on sales of immovables, to two *per cent.* on the first ten thousand dollars, and one *per cent.* on the excess; and on sales of movables to not more than five *per cent.* The total price was forty-four thousand five hundred dollars, of which, as shown hereinafter, two-thirds, or twenty-nine thousand six hundred and sixty-six dollars was for the immovables, and one-third, or fourteen thousand eight hundred and thirty-three dollars was for the movables. Computing on this basis, and supposing the judge *a quo* to have allowed the full five *per cent.* on the price of the movables, we find that the commission of the auctioneer amounted to one thousand one hundred and twenty-four dollars. Now if to this we add the hospital tax and the exchange fees, two hundred and sixty-nine 50-100 dollars, and the eleven 70-100 dollars which counsel of opponent are disposed in their brief to allow to the newspapers for printing, we have one thousand four hundred and five 20-100 dollars, an amount exceeding by over two hundred dollars, the one thousand one hundred and ninety-four dollars allowed in the account.

This brings us to the thirty-two thousand seven hundred and thirty dollars item; that is to say, to the gist of the controversy. Opponent claims that this indebtedness is not proved. We think it proved abundantly. The Color Works was embarrassed. Its board of directors provided for the creation of bonds secured by mortgage on the immovables of the concern. Under resolution duly passed, sixteen thousand dollars of these bonds was sold to Frank Roder, and fourteen thousand dollars was pledged as collateral on a twelve thousand dollars note due

the Metropolitan Bank. Every dollar of the price of the sale was paid to the company, and the debt secured by the pledge was an unquestionable debt. The pledge was in the usual form, carrying the right to sell, etc. Acting clearly within the express terms of the pledge, and after repeated demands, and after ample warning to the receivers, the Metropolitan Bank sold to itself the bonds at what was considered to be a fair price, there being no market price, the bonds not being listed. The sale of the sixteen thousand dollars of bonds is proved; the existence of the twelve thousand dollars debt is proved; the pledge is proved. The opponent, Martinez, was a member of the board of directors, and as such, participated in the passing of the resolutions by which the sixteen thousand dollars of bonds was sold and the fourteen thousand dollars was pledged.

The testimony of Mr. Henry P. Dart, whose statements this court knows can be accepted implicitly, puts beyond the shadow of a doubt the soundness of these transactions. After this, what difference can it make that Mr. Hare and then Mr. Wuerpel were trustees for holding these bonds. How the owner and the pledgee of these bonds wanted them to be held, was their own business. These bonds, and the interest thereon, thirty-two thousand seven hundred and thirty dollars, were properly placed on the account as a mortgage debt.

But the mortgage bore only on the realty, and the debt secured by it is entitled to preference only on the price of the realty. As the sale was made in block, the real and the personal property together, this price of the realty can be separated only by an equitable apportionment. For this apportionment the obvious basis to adopt is the appraisalment. The appraisalment of the realty was forty-five thousand dollars, and of the personal property fifteen thousand dollars. The proportion is, therefore, as two to one. The total price having been forty-four thousand and five hundred dollars, the mortgage creditors are entitled to take two-thirds of this, or twenty-nine thousand six hundred and sixty-six dollars. On no theory can the mortgage creditors claim a preference on the price of the movables.

The price must be dealt with as if in the hands of the receivers. The sale having been a judicial sale, the proceeds thereof had to be paid into the hands of the officers of the court. If the receivers permitted the purchaser to pay it direct to the creditors, they did so without right and at their risk and peril. The property passed to the pur-

chaser free of the mortgage securing the bonds, this mortgage having shifted to the proceeds. Hennen's Digest, Vol. 1, p. 262.

The opponent moved for a continuance on the ground that the fixing of the case for trial had not been posted as required by the rules of court, and that, consequently, he had had no notice of the fixing. In passing on this motion the court said:

"The records of this court show that this case was called for trial on September 26th, and duly posted. The opposition was filed after the case was called for trial. It was called on the 28th and fixed for trial on the 15th of October. On the 15th of October, the case was again continued for trial until to-day (29th of October). The opposition not having been filed before the case was called, and a statement having been made before the court by counsel, that Judge Duggan, counsel for opponent, was aware that the case was fixed at one time in this court for trial and posted, and considering that there is a large amount of money to be distributed in this case, in which there are a number of lawyers engaged, the court, under the law, exercising its discretion, refuses the continuance and orders the case to proceed to trial."

This ruling has our approval. The object of posting is to give notice, and the opponent in this case had notice and full time for preparation. The several bills of exception reserved by opponent to the admission of testimony are without merit.

It is, therefore, ordered, adjudged and decreed, that the judgment signed on May 30th, 1900, homologating the statement of the receivers for quarter ending February 28th, 1900, and the judgment signed on July 3rd, 1900, homologating the statement of the receivers for quarter ending May 31st, 1900, and the judgment rendered and signed October 5th, 1900, homologating the final account of the receivers in so far as not opposed, be annulled and set aside.

It is further ordered, adjudged and decreed, that the judgment rendered November 13th, 1900, and signed November 19th, 1900, be affirmed, except in the particulars hereinafter specified. It is ordered, adjudged and decreed that the receivers herein account to the creditors herein for the price of the sale of the property heretofore sold herein as if said price had been by them collected; and that the said receivers file a new account herein distributing the said price and the other funds of the estate on hand as per the final account, as follows:

To privileged creditors the sum of four thousand nine hundred and eight and 60-100 (\$4,908.60) dollars, as heretofore decreed; to the holders of the mortgage bonds the sum of twenty-nine thousand six hundred and sixty-six dollars (\$29,666); to the ordinary creditors *pro rata* the remainder, after first, however, satisfying costs and other privileged debts, including the auctioneer's bill as heretofore allowed.

The costs of this appeal to be borne by the estate.

No. 13,792.

MARCO BENDICH ET ALS. VS. LUKE SCOBEL ET ALS.

SYLLABUS.

ON MOTION TO DISMISS APPEAL.

1. An appeal will not be dismissed because of the absence from the transcript of evidence which could not, if present, influence the decision of this court.
2. The fact that counsel representing a number of appellants describe themselves, at one place in the motion, and in signing the bond of appeal, as "attorneys for plaintiffs" is not sufficient reason for dismissing the appeal for uncertainty as to the party appealing, when it otherwise appears, in such motion and bond, that it was the purpose to appeal for all the parties cast. As to the bond, it would have been good, if it had been signed by none of the appellants.

ON THE MERITS.

1. Bayou LaChute has its source and runs its course in the Parish of Plaquemines, and is not a navigable stream in any sense that places it beyond the dominion and control of the State of Louisiana.
2. Hence, *quoad* a mere squatter, upon land owned by the State, and fronting on said Bayou, it is competent for the State to make a "cut-off," connecting said Bayou with other waters; and it is equally competent for the State to recognize or tolerate such "cut-off" when made by other persons.
3. And so, when a "cut-off" has been made and the State thereafter leases its lands upon the Bayou to persons, otherwise "squatters," who have full knowledge of its existence, and the one lessee makes no stipulation concerning it, whilst the other takes a lease of the "cut-off" itself, for the planting and cultivation of oysters, the one lessee has no right to close such "cut-off" to the injury of the other, even though he may find it prejudicial to the oyster beds upon the property leased by him.
4. The damages to be allowed for an alleged trespass must be established with reasonable certainty, and will not include traveling expenses, loss of time or attorney's fees incurred for the purposes of prosecutions instigated against the trespasser by the party claiming.
5. And, where the punishment of the trespasser has been submitted to and acted on by or is pending in the Criminal Court, the Civil Courts will be slow to inflict punitive damages.

Bendich et als. vs. Scobel et als.

A PPEAL from the Twenty-ninth Judicial District, Parish of Plaquemines.—*Hingle, J.*

A. E. & O. S. Livaudais, for Plaintiffs, Appellants.

James Wilkinson, for Defendants, Appellees.

Joseph C. Gilmore, and *Philip M. Gilmore*, for W. V. Gilmore, and as *amici curiae* (on application for rehearing).

On Rehearing *per curiam*.

STATEMENT.

The opinion of the court was delivered by

MONROE, J. In 1859, Marco Bendich established a camp for the fishing of oysters upon a point of swamp land, in the Parish of Plaquemines, owned by the State, and lying between Bayou LaChute, on the east, and Bay Bastian, on the west. Since that time, other persons have established similar camps, and there are, now, in that vicinity, ten or twelve such camps, consisting of small houses, built on piles driven into the marsh, in which the fishermen and their families make their homes. A short distance to the north of Bay Bastian, in Bay Adam, out of the east side of which Bayous Cherie and Longue flow, in a southerly direction, until, meeting together, they form Bayou LaChute, the general course of which is, also, southerly, a few hundred feet to the eastward of, and, approximately, parallel with, the shore of Bay Bastian, until it empties into that bay, upon the southeast side, the land between the Bayou and the bay and upon the shores of the bayou being that upon which the plaintiff, Bendich, is established, and the bayou, itself, near its mouth, being the site of his, and of the other plaintiffs, oyster beds. There have, also, been, for a number of years, other camps and other oyster beds established on Bayou LaChute, higher up the stream, the occupants and owners of which were, formerly, in the habit of getting into Bay Bastian through the mouth of the bayou, but, in 1888, they made a canal, or "cut off," across the strip of land between the Bayou and the bay at a point near their camps and beds, which are, probably, less than a mile to the northward from the Bendich settlement; the purpose, as we conclude, from all the

testimony, being; to enable them to pass, more conveniently, from their oyster beds in the bayou to their other beds in the bay; to facilitate the loading of luggers anchored in the bay; and, also, possibly, to obtain more salt water for their oysters, bedded in the bayou. The "cut off," when first made, was eleven feet wide, and not more than two feet deep, and, in that condition, would have inflicted no injury upon the fishermen below. They were, nevertheless, apprehensive, and closed it, within two months, or less time, after it was opened. It was, however, soon reopened by those who had made it, and, thereafter, remained open, increasing in width and depth, until May, 1900, when it was again closed, by the men from the Bendich settlement, who were, thereupon, arrested and committed for trial before the criminal Court, at the instance of their upstream neighbors.

It was at this time that the plaintiffs, fourteen in number, brought the present action, the prayer of the petition in which reads as follows:

"Wherefore your petitioners respectfully pray that a writ of injunction herein issue, directed to the said defendant, Luke Scobal, and others, forever enjoining and restraining them from opening the said canal, or crevasse, and in any (manner) otherwise do (!) any action calculated to injure, damage, or destroy, your petitioners' property, or disturb them in the possession of their rights, or obstruct, change, or alter the course of Bayou LaChute, a navigable stream, and that they be duly cited to appear and answer hereto, and that, after due proceedings had, there be judgment in favor of your petitioners, and against the said defendants, perpetuating the injunction herein issued, and condemning defendants to pay all costs."

Upon the petition, as thus filed, a preliminary injunction was issued, purporting to restrain the defendants from opening the "cut off." As a matter of fact, the "cut off" was, at that time, open, but some of the plaintiffs proceeded to close it, after the issuance of the injunction. The defendants, through their counsel, took a rule to dissolve the writ, which was made absolute, as to all the plaintiffs except Bendich (who had not participated in closing the "cut off"), upon the ground that they had neither made affidavit, nor given bond; and they, then, took a rule ordering Bendich to show cause why the *status*, as it existed prior to the institution of the suit, should not be restored, which was referred, by the trial judge, to the merits. Thereafter, the defendants answered, and the case was tried upon its merits, with the result, that there was judgment for the defendants, dissolving the

injunction, *in toto*, dismissing the suit, and awarding damages, in favor of the defendant, Scobal, and against the plaintiffs, *in solido*, in the sum of \$500; and from this judgment the plaintiffs have appealed.

It appears, from the evidence, that Bay Bastian is an estuary, opening into the Gulf of Mexico, across the mouth of which there is a small island, known as "Shell Island," and that, upon each side of this island, there is, or was, a passage to the gulf. It further appears that when Bendich established himself in his present camp, more than forty years ago, the tide passed through the, then, existing channel, to the eastward of Shell Island, and that there was considerable current, and fairly good navigation, for fishing boats, in said channel, along the eastern shore of the bay and in front of the mouth of Bayou LaChute. In the course of years, however, whether by reason of particular storms, or of the prevalence of winds, blowing in a particular direction, or because the bayous entering the bay upon the west side carry more water, and have stronger currents, or, because the "cut off," which is here complained of, has diverted the water of Bayou LaChute, so that less of it passes through its lower reach, and mouth, or, from these, and other, causes, combined, the fact is, that a change has taken place, and the tide now ebbs and flows almost entirely through the channel to the westward of Shell Island, which, at this time, is known as "Grand Bayou Pass," and is the only practicable pass from the bay to the gulf. whilst in the pass to the eastward, there is dry land, at low tide; the water upon the eastward shore of the bay in that vicinity is shallow; the bar at the mouth of the bayou obstructs the entrance thereto; and the lower reach of the bayou is filling up with mud, which threatens the destruction of the oyster beds there situated.

Our conclusion, upon this subject, is, that the filling up of the bayou, between its mouth and the "cut off," may, fairly, be attributed, in part, to the change resulting from natural causes, which has taken place in the movement of the water, between the bay and the gulf, and, in part, to the larger percentage of water which is diverted from the bayou, by the "cut off," which is now forty-two feet wide, and quite deep; and, whilst we are unable to say in what precise proportions these causes respectively, produce the effect thus mentioned, we are convinced that the withdrawal of the volume of water now diverted by the "cut off," is a potent influence, whereas the "cut off," considered with reference to its dimensions in 1888, was comparatively, harmless.

It further appears, from the evidence, that Bayou LaChute has its source and runs its course entirely within the body of the parish of Plaquemines, and is navigable, when navigable at all, for very small craft; that the adjacent swamp land and the bed of the bayou, itself, belong to, and are under the control of, the State of Louisiana; and that, as between the State and the parties to this litigation, whatever legal rights the latter may possess, whether with respect to the occupancy of the land, upon which their camps are established, or to the bottoms, in which their oyster beds are planted, are, and must be, derived from the State, or its representatives, the Parish of Plaquemines.

It further appears that the "cut off" in question, had been open, continuously, for more than eleven years before the plaintiffs undertook to close it, in May, 1900, and that, during that time, neither the State of Louisiana, nor the Parish of Plaquemines, nor the plaintiffs herein, made any complaint of it; but that, on the contrary, the plaintiffs have, within that period, leased the bottoms upon which they are now bedding their oysters from the Parish of Plaquemines, with full knowledge of the existence of the "cut off," whilst the defendant, Scobel, has leased his oyster beds from the same authority, by a contract in which the "cut off" is not only mentioned, but included.

The evidence as to the cause and extent of the inquiry to the defendant, Scobel's oyster beds, as to traveling expenses incurred by him, and as to loss of time sustained, is inconclusive and unsatisfactory, whilst: that in support of the claim for attorney's fees relates to fees for services rendered in connection with the closing and opening of the "cut off" in May, 1900, and the subsequent prosecution of the plaintiffs, resulting in their being compelled to pay fines and costs to the amount of \$287.00.

ON THE MOTION TO DISMISS THE APPEAL.

The defendants, through their counsel, move to dismiss the appeal, on the grounds: (1) That all the evidence adduced and filed is not included in the transcript; and (2) that it does not sufficiently appear, from the motion and bond, by which of the plaintiffs the appeal was taken.

Concerning the first ground; we find the following in the transcript: "Defendant offers the affidavit, warrant and commitment, and bonds to the District Court, in the case of the State of Louisiana vs. John

Hihar *et als.*, also, the record No. 40, and verdict and sentence therein, in the case of State of Louisiana vs. Anthony Tonkovitch *et als.*

"It is admitted that the defendants in the above judgment referred to paid their fines and costs, which amounted to \$287 and filed as Exhibit No. 7 D.

"And also the proceedings of this suit from the minutes."

The complaint is, that the clerk had included in the transcript, only the affidavit and warrant, in the one prosecution, and the information, in the other, and this complaint is sustained by the facts. There is no doubt, therefore, that the transcript is defective, as alleged. We are unwilling, however, on that account, to dismiss the appeal, in view of the admission as to the result of the one prosecution, and of the information offered by the affidavit and warrant, as to the other; since nothing else, in either record, could affect the merits of this case. As to the second ground; it is true that the counsel by whom the appeal was taken appear to have styled themselves "attorneys for *plaintiff*," at one place, in the motion, and, also, in signing the appeal bond; but, in both motion and bond, the title of the suit is given, the judgment, from which the appeal is taken, is described, as having been rendered against the *plaintiffs* (in the plural), and the parties appealing are referred to as the "*movers*," and, as "Marco Rendich *et als.*" respectively, so that, there can be no reasonable doubt as to the purpose of either motion or bond. "The fact that the appeal bond is signed by only one of several appellants does not vitiate the appeal, inasmuch as, under the settled jurisprudence of the State, such bond is valid, even if not signed by the appellant."

Murrell vs. Murrell, 33rd Ann. 1233.

The motion is, therefore, denied.

ON THE MERITS.

The plaintiffs were, originally, "squatters" on swamp land belonging to the State, and bedded their oysters in a stream over which the authority of the State was paramount. Beykin vs. Shaffer, 13 Ann. 129; Hamilton vs. R. R. Co., 34 Ann. 970; Egan vs. Hart, 45 Ann. 1363; Leovy vs. U. S., 177 U. S. 621. That condition of affairs would not, however, have justified the defendants, having no better right upon the property, and in the absence of any complaint from the owner, in molesting the plaintiffs, whether by diverting the stream in which their oysters are bedded, or otherwise. And, whilst it may be that the

"cut off," as originally made, in 1888, did not amount to such molestation, the evidence shows that, in 1900, it had attained such proportions as to inflict serious injury.

If, therefore, the owner had held, and was still holding, aloof, we are not prepared to say that the plaintiffs would not be entitled to some relief. But, after the closing of the "cut off," in 1888, and the opening of the same, shortly afterwards, the plaintiffs took no further steps, and allowed the "cut off" to remain open for more than eleven years. In the meanwhile, the plaintiff, Bendich, and the defendant, Scobel, alike, obtained, from the Parish of Plaquemines, acting as the representative of the State, under, and by virtue of the authority conferred by Acts 110, of 1892, and 121, of 1896, leases of the land and water front occupied by them, respectively, the lease to Bendich bearing date, January 16, 1893, and that to Scobel, December 31, 1899. It is not pretended that Bendich was ignorant of the fact that the "cut off" was open when he took his lease, but he appears to have made no demand of the lessor upon the subject, and his lease contains no reference thereto. The lease to Scobel, upon the other hand not only refers to, but includes, the "cut off," as part of the water front, leased. Under these circumstances, and as the State did not assume the obligation of closing the "cut off," of which the lessee had knowledge, and did not guaranty that it, or some other outlet, would not, eventually, divert, wholly, or, in part, the waters of the bayou, and as, upon the other hand, the lease to Scobel, made nearly seven years after that to Bendich, during which time the latter had remained silent, was entered into with express reference to the "cut off," as part of the leased property, we are of opinion that the action taken by the plaintiffs, in May, 1900, and the complaint, made in their petition, came too late, and, hence, that the judgment appealed from was correct, in so far as it dissolved the injunction and dismissed the suit.

Upon the question of the damages, claimed by Scobel in reconvention, we have found, as a fact, that the proof, as to the cause and extent of the alleged damages to his oysters and oyster beds, and as to traveling expenses incurred, and loss of time sustained, by him, is unsatisfactory and inconclusive. It seems more likely, from the proof referred to, that the damage to the oysters was caused by storms, rather than by the temporary closing of the "cut off," whether in May, before the suit was filed, or after the filing of the suit, and the method of arriving at

the proportion of oysters destroyed appears to have been a good deal a matter of guess work.

The defendant testifies as follows concerning his traveling expenses and loss of time: "I have spent over \$100, in traveling expenses, for the purposes of that cut off. I have lost one month's time in coming to court. My time is worth \$45. I spent this time and my traveling expenses in trying to get my cut off restored."

Properly speaking, the only damages that he would be entitled to recover in this suit would be such as he may have sustained by reason of the illegal resort to the writ of injunction. Act No. 50 of 1886. If it be conceded, for the purposes of the argument, that the plaintiffs are bound by the testimony as to other damages because of their failure to object to it, the fact remains, that the testimony relied on is insufficient. It gives no particulars and fails to inform us how much of the money and time referred to were expended in attending to the criminal prosecutions instigated by the defendants, and it is not pretended that any part of such expenditure was made for the purposes of this litigation. The only claim for attorney's fees is that made by the defendant, Scobel, who asks to be reimbursed the fee paid, or incurred, in connection with the closing of the "cut off" in May, 1900, and for the purposes of the criminal prosecution which followed that occurrence; the claim of all the defendants, including Scobel, for the recovery of the fee of their attorney for obtaining the dissolution of the injunction in this case, being reserved. There is nothing in the law or jurisprudence of this State which authorizes the allowances of the claim as thus made. *Bentley vs. Fisher Lumber Co.*, 51 Ann. 457. The question of the punishment of the plaintiffs has been relegated to the Criminal Court, and the plaintiffs have been fined, in one proceeding, and, possibly, in another. We do not feel called upon to inflict a further penalty.

For these reasons, it is ordered, adjudged, and decreed, that the judgment appealed from be annulled, avoided, and reversed, in so far as the same condemns the defendants in damages; and it is, now, adjudged and decreed that the demand in reconvention of the defendant, Luke Scobel, as herein made, be rejected, at his cost. It is further ordered, adjudged and decreed that, in all other respects, said judgment be affirmed, the costs of the lower court, except as herein otherwise ordered, to be paid by the plaintiffs, and the costs of the appeal to be paid by the defendants.

PER CURIAM.

After the judgment of the court herein on appeal was rendered, William V. Gilmore presented a petition for rehearing, setting forth that he is aggrieved by the said judgment in this, that he is the owner and in legal possession of the land through which the "cut off," referred to in the opinion of the court, was made, and that his rights of ownership and possession will suffer prejudice and damage if the same are not provided for or reserved in the judgment.

How and when his ownership and possession arose, and just what he claims, and what his grievance is, are set forth at length in his petition and supported by exhibits attached.

It suffices to say that Mr. Gilmore, not having been in any way connected with this suit, or a party to it, so far as the record discloses, is in no manner bound by the judgment rendered.

With regard to the application for rehearing made on behalf of defendant, Luke Scobel, a consideration anew of the evidence has not lead to the conclusion that he should recover in reconvention the damages awarded him by the court *a qua*. Neither are we of the opinion that in respect to such damages (save as to attorneys fees) the judgment of this court should be one of non-suit instead of rejection. The claim for damages was in *contestatio litis*; the parties have had their day in court upon it; let it stand as the thing adjudged.

But as to the claim of the defendants, including Scobel, for the recovery of attorney's fees for obtaining the dissolution of the injunction taken out by plaintiffs, the same was reserved in the opinion heretofore handed down, and, perhaps, should have been mentioned in the decree as reserved. Complaint is made that it was not.

It is, therefore, ordered that the decree of the court herein be amended by reserving to defendants the right to sue for recovery of damages as attorneys fees for obtaining the dissolution of the injunction sued out, and, as thus amended, the decree do stand as the judgment of the court.

Rehearing refused.

No. 14,108.

GUARANTEE TRUST AND SAFE DEPOSIT COMPANY VS. E. C. DREW INVESTMENT COMPANY, ET ALS.

107	251
121	629
107	251
d123	702

SYLLABUS.

1. A purchaser of standing timber, whose good faith is otherwise established, will not be held to have been in bad faith simply because the records showed that the seller did not have title to the land.
2. In order to be in good faith, a purchaser of timber is not obliged to investigate the authority of the firm he deals with, where such firm is reputable and is engaged in the business of buying and selling lands and timber both for itself and for others.
3. A firm is liable for the tort of one of its members committed in the course of the partnership business and whereof the firm has had the benefit.
4. The individual members of a firm are liable for the tort of one of the members of the firm, although they had no knowledge thereof, where such tort was committed in the course of the partnership business and for the benefit of the partnership.
5. Where a partnership advisedly sells the timber of a third person to an innocent purchaser, who cuts down the timber and takes it to market and sells it, both the partnership and the purchaser are trespassers, and are solidarily liable in damages to the owner of the timber; but in fixing the amount of damages decreed to be paid by the parties, a different basis will be adopted; as to the innocent purchaser, the basis will be the value of the timber at the stump; as to the firm, held as a trespasser in bad faith, the basis will be the value of the timber after reaching market.

A PPEAL from the Sixth Judicial District, Parish of Ouachita—
Hall, J.

Merritt Munholland and Andrew Augustus Gunby, for Plaintiff,
Appellant.

E. Tyler Lamkin, for The E. C. Drew Investment Co., Defendant,

Appellee.

Stubbs & Russell, for M. S. McGuire, Defendant and Appellee.

The opinion of the Court was delivered by

PROVOSTY, J. The defendant firm, the E. C. Drew Investment Company, was engaged in the business of buying and selling lands and timber and of acting as agent for the owners of lands and timber in selling the same. It bargained with the co-defendant, Manning S.

Maguire, for the sale to him of timber, and referred him to its agent Lee Harris, one of the defendants, to point out the timber and agree upon a price. Harris pointed out the timber of plaintiff, and Maguire cut, removed and sold the same. And this suit is for damages against all said parties, and against the members of the E. C. Drew Company individually, *in solido*, upon allegations of conspiracy to depredate upon plaintiff's lands.

Maguire pleads the general denial, and that he bought the timber in good faith. The E. C. Drew Investment Company and the members individually, plead the general denial, and also that the timber sold by them was on their own property. They specially deny the allegations of conspiracy.

We think that Maguire bought the timber in good faith. Drew & Co. were a reputable firm selling timber for their own account and for others; to deal with them was in regular course. Maguire was under no obligation to investigate their authority; our law does not expect that suspicion and distrust shall inspire the conduct of our business men in dealing with each other, but rather an honest business confidence. Good faith, says our code, is presumed until disproved.

For certain purposes registry conveys notice, or knowledge, and defendant's counsel argues that the registry of plaintiff's title conveyed to Maguire knowledge that Drew & Co. were not owners of the land. Counsel cites in support of this contention the case of *Heirs of Dohan vs. Murdock*, 41 Ann. 494. The case is good authority against the contention of counsel. See also the cases of 4 La. 474; 5 La. 242; 33 Ann. 769; 38 Ann. 885; and *Heirs of Ford vs. Phillips*, 47 Ann. 339.

The E. C. Drew Investment Company and the individual members thereof must be held liable to plaintiff as trespassers in bad faith. The sale of the timber was made advisedly; and it was made in the course of the partnership business, by the managing partner of the firm, in the name of and for the benefit of the firm; and the price went into the coffers of the firm. Under these facts all the partners are liable.

Their defences are, first, that Drew did not authorize Harris to sell the timber on the land of plaintiff, but only the timber on the land of the E. C. Drew Investment Company; and, second, on the part of the individual members of the firm, that they had no knowledge of the transaction, and, as a consequence, are not parties to it and are not responsible for it.

If it were conceded that Harris in selling the timber of plaintiff transcended his authority, still, on familiar principles, the partnership would be liable, since the act was done in the course of the execution of the agency.

But, as a matter of fact, Harris did not transcend his authority. When he made the sale he had in his possession a map on which were marked the lands of the Drew Company, and among these the lands of the plaintiff figured; and he testifies that this map was given him by Drew for his guidance in making the sale. If so, he did not transgress his authority. Drew was not permitted to testify on the trial, as to whether he had, or not, given such a map to Harris, the court holding that the point was settled by a judgment on a rule taken on Drew early in the case to produce the map; which, it seems, had been left by Harris in the office of the Drew Co. Whether this ruling was correct or not, need not be considered, for if we assumed that Drew had testified and had denied most positively and circumstantially that he had given the map, we should accept the statement of Harris on the subject; and this for two reasons: first, that it accords with the attending circumstances of the case; and, secondly, that on the trial of the rule in question Drew testified that he did not "exactly remember" whether he had given any map at all to Harris; and, of course, this absence of recollection could not well be reconciled with a subsequent positive denial.

The want of knowledge on the part of a member of a firm of the tort of his co-partner will not be good ground for exemption from liability for such tort, if, as in this case, the tort was committed in the course of the partnership business, and in the name of and for the benefit of the partnership; and especially if the partnership profited by the transaction.

In combatting this proposition, counsel for defendant cite Addison on Torts, vol. 1, p. 667, as follows:

"One partner cannot drag another into a trespass without his previous consent, or without his subsequent concurrence. It must be shown, either by evidence before the transaction that they joined in committing the trespass, or by evidence afterwards that they concurred in and received the benefit of it."

If by this is meant merely what is said, namely, that as a general proposition one partner cannot drag his co-partners without their consent into every trespass which he may choose to indulge in, we have

nothing to say; but if it is meant to contradict the proposition laid down above, then we must call upon the author to cite his authorities. Two cases are referred to by him in his marginal notes in support of the text. One of these cases, *Petrie vs. Lamont*, we have not had access to; the other, *Chester vs. Dickerson et als*, 54 N. Y. 1, was cited either by mistake, or as a case *contra*; for it certainly does not support the text.

One of the members of a partnership between dealers in real estate poured petroleum upon a tract of land to induce plaintiff to believe that it was oil producing land, and sold the land to plaintiff as of that character, all without the knowledge of his co-partners: held, syllabus, as follows:

"Where a fraud is perpetrated by one of the members of such a partnership in the prosecution of a partnership enterprise, all the partners are liable, although the others had no connection with, knowledge of, or participation in the fraud."

Thus it is seen that the case does not support the text. But counsel cite one of our decisions, *Allen, Nugent & Co. vs. Carey et als*, 33 Ann. 1455, as supporting the text in question. On examination it will be found that that case is authority for nothing more than that a partner cannot bind the firm as security for the debt of himself or of a third person, outside of the course of the partnership business.

The proposition laid down by us above is well supported by authority.

In the Am. & Eng. of L. Vol. 17, p. 1067, we find the following:

"While the willful and malicious torts of a member of a firm are not usually within the scope of his employment, and consequently do not render his partners liable, yet if such an act is committed clearly and plainly for the benefit of all, and in the usual and ordinary prosecution of the partnership business, all are liable, notwithstanding the malicious motives of the partner committing the act." Vol. 17, p. 1067.

Story, treating the same subject, after discussing the liability as deduced from the maxim, *qui facit per alium facit per se*, goes on, as follows:

"The doctrine has been carried further; and the partnership has been held for libel which was published and sold by one partner in the course of the business of the firm, as, for example, by a printer or bookseller, one of the firm in that business. The same rule might

apply to cases of written slander, as by declaring a rival merchant a bankrupt, or a cheat, if written in the name, and as an act, of the firm. So, if breaches of the revenue laws by fraudulent importations, or smuggling, or entries at the customhouse, are committed by one of the firm in the course of the business thereof, all of the firm would be liable penally, as well as civilly, therefor." Story on Partnership, para. 166.

In a note on page 149 of Lindley on Partnership, Wentworth's Notes, we find the law on the subject stated, as follows:

"Partners are liable in civil actions upon the principle of agency for the fraudulent or malicious conduct of one of their members done without the knowledge of the others for the benefit of the partnership and within the scope of its business." Citing a long list of cases.

In the case of *Stockwell vs. United States*, 13 Wallace, 491, the defendants were sued as members of a partnership for double the value of certain shingles imported by the partnership without payment of import duties. The debt was by way of penalty for breach of the revenue laws. The fraud upon the government was the act of only one of the members of the firm, the other members had no knowledge of it; but the firm received the shingles, and sold them in due course of business. It was argued that the innocent members of the firm could not be charged with knowledge of the fraud of their associate. The court held that they were liable, and in the course of the opinion said:

"It is not seriously denied that in civil transactions a principal or a partnership is affected by a knowledge of the agent or co-partner, and that the knowledge of the agent is in law attributed to his principal, as well as that of the partner to all the members of the firm; nor is it much insisted that a principal, or a co-partner, is not liable for the tort of an agent, or co-partner, done without his knowledge or authority, in suits brought by third persons to recover compensation or indemnity for loss sustained in consequence of the tort; but it is argued that the rule does not apply to the case of suits for a penalty." And again:

"That as a general rule partners are liable to make indemnity for the tort of one of their number, committed by him in the course of the partnership business, is familiar doctrine. * * * * "The tortious act of the agent is the act of the principal, if done in the course of his agency, though not directly authorized. And this is emphatically true

when the principals, as in this case, have received and appropriated the benefit of the act."

The same rule obtains in the civil law. We translate from Fuzier Herman, 1384, as follows:

"The responsibility of the principal for the injury caused by his agent is not restricted to cases where the acts complained of came within the terms of the agent's authority; in order that the principal should be responsible it is sufficient that the act complained of should be connected with "(se rattache à)" the object of the agency, and that it should have been done in the course of the execution of the agency, (a l'occasion de son execution)."

Among the cases cited as illustrative of the acts for which the principal is thus held to be responsible, we find the following: Owner of a line of stage coaches held liable for damage caused by one of its drivers in diverting travelers from plaintiff's hotel. Bordeaux, 29 Juilliet, 1856. Railway company liable to government for smuggling done by one of the employees on its trains. Lyon, 1er Juilliet, 1872. All members of firm civilly liable for a forgery committed by one of the members in the course of the partnership business. Alger, 20 Mai, 1879. Lessees of a preserve civilly liable for murder of one of the sub-lessees by one of the special guards in the course of a hunting expedition in which the murderer was taking part in his capacity of guard. Paris, 19, Mai, 1874. These are, of course, the extreme cases, and are given here, not by way of approval, but merely to show how far the doctrine has been carried.

The liability of the innocent partners is not to be deduced entirely and exclusively from the principles of the law of agency. As stated by Judge Story, *supra*, it "has been carried." It derives also to some extent from the equity of making the loss fall, as between two innocent parties, on the one of the two who contributed to bring it about. By holding themselves out as members of the firm of Drew & Co., the defendants gave business standing to the concern, thereby contributing to the tort. If it had not been for the prestige given by them to the firm, Maguire might not have dealt with Drew, or, a least, might have been more cautious. In fact Drew, standing by himself, might have been entitled to so little confidence that in dealing with him Maguire might have exposed himself to the imputation of bad faith. We do not wish to be understood as saying that such was the case, but only that such might have been the case. The record does not show what the reputation or business standing of Mr. Drew were. For all

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we know they may have been very good. The fact that Maguire can find shelter behind the reputableness and responsibility which these innocent members have contributed to impart to the firm, shows that these members are to some extent responsible for the tort. The liability of the innocent members is also founded in part on motives of public policy. It would be dangerous to the community to allow a set of men to depredate upon the public under the shelter of an irresponsible associate; as might be done with impunity, if so-called innocent members of a firm might hold themselves out as members, and yet not be liable for the acts of their partner in matters within the scope of the partnership business.

We adopt the estimate of the lower court as to the quality of timber taken, namely, 661,000 feet. This we understand to be the number of feet, according to the measurement made for the sale of the timber, and for the settlement between Drew Co. and Maguire; but computed under Doyle's rule, as required by our law. Maguire having been in good faith, must pay according to the value at the stump, shown to have been 50 cents per thousand. For the other defendants, holding them to have been trespassers in bad faith, we must adopt a different basis.

In the case of Wooden Ware Co. vs. United States, 106, U. S. 432, the defendant who had in good faith bought 242 cords of wood from the trespasser, was sued for the value of the wood; and the question was whether his liability should be measured by the value of the timber on the ground after it had been felled, or at the place it had been removed to when sold. At the former place the value was 25 cents, at the latter place \$3.50, per cord. The court held that this last value had to be taken at the proper measure. The case has been cited with approval and its doctrine enforced in a very large number of cases. See also Am. & Eng. Ency. of L., Vol. 26, p. 640, Note. We shall adopt the same basis.

The E. C. Drew Investment Company and its members are, therefore, liable for the timber when sold at Monroe, namely, \$4.50 per thousand feet.

The defendants being held for a tort, their liability is *in solido*. Art. 2324 C. C.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be set aside; and it is now ordered adjudged and decreed that the plaintiff, the Guarantee Trust and Safe Deposit Com-

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pany, have judgment against all of the defendants, namely, E. C. Drew Investment Company, Robert B. Blanks, John B. Parker, J. E. Reynolds, E. C. Drew, Lee Harris and Manning S. Maguire, in solido, for the sum of three hundred and thirty 50-100 dollars with legal interest from this date; and against all of said parties, except Manning S. Maguire, *in solido*, for the additional sum of two thousand six hundred and forty-three dollars, with legal interest thereon from this date; reserving to Manning S. Maguire his right to sue the proper parties for the sum herein decreed to be paid by him. The defendants to pay the cost in both courts.

BLANCHARD, J., concurs in the decree.

Rehearing refused.

No 13,877.

JOSEPH L. BOURDETTE VS. ADOLPHE H. SIEWARD.

SYLLABUS.

1. The violation by a person of the legal rights of another renders the latter liable for some damages, without proof of actual damage.
2. Damages claimed from the president of a corporation by a stockholder for having refused to allow him to inspect the corporation books, where the officer has not acted in bad faith, must be those of which the refusal is the legal proximate cause, and of these due proof must be made; remote, uncertain, collateral and speculative damages cannot be recovered.

A PPEAL from the Civil District Court, Parish of Orleans.—*St Paul, J.*

Clegg & Quintero, for Plaintiff, Appellee.

Buck, Walshe & Buck, for Defendant, Appellant.

STATEMENT OF THE CASE.

The opinion of the Court was delivered by

NICHOLLS, C. J. Plaintiff sued to recover five thousand eight hundred dollars from the defendant for damages alleged to have been incurred by him. He averred in his petition that at the institution of

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his action he was the owner of five hundred and sixty shares of stock of the New Orleans Gas Light Company; that in February, 1897, he was the owner of three hundred and ninety-eight shares of stock; that defendant was, in February, 1897, and was still the President of that company, and was then and was still the custodian of its books; that petitioner, as such stockholder, during the month of March, 1897, and various other dates, particularly on June 2, 1897, on which last date he was the holder and owner of five hundred shares of stock, claimed the right to inspect and examine the books of the company, wherein was recorded the amount of the capital stock subscribed, the names of the owners of the stock, the amount owned by them respectively, the amount of stock paid and by whom, the transfer of stock, and the date of transfer, and the assets and liabilities of the company; that he made formal demand of the right of inspection and examination guaranteed him by law, of the said Adolphe H. Seward, President and custodian, and the exercise of this right was forbidden him and denied to him by the said Adolphe H. Seward.

He demanded the exercise of this right and sought the information to be derived therefrom in order to determine the then present value of his holdings of stock and in order to guide his future action in reference to the shares of stock of the said company; that, in order to exercise this right and to enjoy the fruits thereof, petitioner was compelled to institute suit, and to obtain a writ of mandamus from the Supreme Court, requiring the said Adolphe H. Seward, President, to open to petitioner's inspection and examination the aforesaid books of the company.

That Adolphe H. Seward, President, as aforesaid, resisted by all means in his power the demand of petitioner, requiring him to prosecute the suit in the Civil District Court and in the Supreme Court of the State of Louisiana, and to finally compel the issuance of a rule for contempt, and only opened the books to the inspection and examination of petitioner under fear of imprisonment on the ——— day of January, 1898, although a formal demand by suit and otherwise had been made in the early part of the year 1897, to-wit: on the 23rd day of February, 1897, and frequently thereafter: all of which will more fully appear by reference to the suit No. 52,548 of the docket of the Civil District Court entitled *State ex rel. Joseph L. Bourdette vs. A. H. Seward, et al.*, reference thereto being made for greater certainty.

That the information which he sought by his demand to inspect and examine the books aforesaid, which right was denied him, was necessary to petitioner in order to determine whether or not he would sell his then holdings in the shares of the company or whether or not he would purchase additional shares of the stock of the company; that the information which he has since obtained, and of which he is now possessed, and which he could have obtained at the time the inspection and examination of the books were denied him, is of such a character that it would have determined petitioner to sell his stock at the price then ruling in the open market, and would have prevented him from buying and would have determined him not to buy additional shares of the capital stock of the company, which he has purchased since those dates; that if petitioner had been permitted by the said Adolphe H. Sieward to obtain the information and a knowledge of the facts contained in the books of the company at the several times he demanded them, petitioner could have sold his shares of stock at prices ranging from one hundred and twenty-seven dollars per share of the par value of one hundred dollars, to one hundred and thirty-one dollars per share of the par value of one hundred dollars; that since obtaining the information which the books of the company afforded, and which he has obtained by the inspection and examination of the books, and which, had he been possessed of in March and April, 1897, he could and would have sold his stock at prices ranging above one hundred and twenty-seven dollars per share of the par value of one hundred dollars; that petitioner has since been unable, since he obtained the information afforded by the books aforesaid, to sell his shares in the open market for a greater price than one hundred and seventeen dollars per share of the par value of one hundred dollars.

Petitioner showed that at various times and dates at which he demanded to be permitted to exercise his right to inspect and examine the books aforesaid, which right was then and there denied him, these books afforded the information that the officers of the company, that the President himself, Adolphe H. Sieward, several members of the board of directors of the said company and others, who were holders of a large number of the shares of the company, were selling the same, and had sold their shares, which fact and information, if petitioner had been allowed to obtain it from the books aforesaid, would have determined petitioner to sell the shares of stock which he held at the then ruling prices, as above set forth, and would have determined

petitioner not to buy other shares, and petitioner would thereby have avoided the loss and damage that had come to him by the falling of the price of the shares aforesaid.

That at the several times hereinbefore set out, at which he made the demands to exercise his right to inspect and examine the books aforesaid, the exercise of which right was denied him, these books aforesaid afforded the information, nowhere else obtainable, of the fact that there had been spent by the company, through its President aforesaid, within the past few years, the sum of more than fifty thousand dollars (\$50,000.00) for which no voucher appears, and the reason for which expense is to this date a secret and the truth concerning which is not exposed and not known to the shareholders; which information, if it had been afforded to petitioner at the time he made the demands aforesaid, would have determined petitioner to sell his shares of stock at the then ruling prices aforesaid, and would have prevented him from buying and determined him not to buy additional shares as aforesaid, and would have saved to petitioner the consequent loss and damage resulting to him from the fall in prices since that date, as hereinbefore set forth.

That there are other facts and additional information acquired by petitioner from the inspection and examination of the books since the same had been allowed by him and under the judgment of this court, which existed in the books and was obtainable from the books at the dates and times hereinbefore set out, and which was denied him, the exercise of his right to inspect and examine the books, which facts and information, if then and there allowed petitioner, or obtained by him, would have determined him to sell his shares of stock, and he could and he would have sold them for the price of one hundred and twenty-nine dollars per share of the par value of one hundred dollars, and for which shares he cannot now obtain a greater price than one hundred and twelve dollars per share of the par value of one hundred dollars.

That the denial of the right to inspect and examine the books aforesaid has caused petitioner further damage in expenses of a lawsuit hereinbefore referred to, in costs of court and attorney's fees in the sum of more than three hundred dollars, and that the acts and conduct of the said Adolphe H. Seward in denying petitioner the right to inspect and examine the books aforesaid has caused petitioner damage in the manner and form herein set out in the sum of five thousand eight hundred dollars.

He subsequently filed a supplemental and amended petition in which he reiterated all of the allegations of his original petition and further alleged that formal demand to exercise the right to examine and inspect the books of the corporation was made on the 23rd of February, 1897, by formal letter addressed to the Secretary of the New Orleans Gas Light Company; that the same demand was made of Adolphe H. Sieward verbally before the institution of the suit No. 52,548 of the docket of the Civil District Court, entitled the State ex rel. Joseph L. Bourdette vs. The New Orleans Gas Light Company.

That formal demand was made by service of the petition and order issuing from the Civil District Court, as appears by the Sheriff's return therein in the aforesaid suit No. 52,548; that this demand, as set forth in the original petition herein filed, was made by Clegg & Quintero, attorneys, on behalf of and under direction of Joseph L. Bourdette, plaintiff, by letter dated June 2, 1897, and that day delivered to Adolphe H. Sieward, defendant herein.

And that a like demand was made in person by Joseph L. Bourdette by delivering a demand in writing on the 27th day of December, 1897, and that a demand to be allowed to examine and inspect the books of the New Orleans Gas Light Company in the custody and under the control of Adolphe H. Sieward, defendant, was constantly made by plaintiff in person and by letter during the year 1897, between the months of February and December of that year.

That these demands were made for the purpose, in the manner and under the conditions and circumstances as set forth in his original petition, and that each and every and all of these demands were refused and his right ignored and denied.

The defendant filed a number of exceptions, which were overruled; he then answered. After pleading the general issue, he admitted that at certain times the plaintiff did make demand as an alleged stockholder of the New Orleans Gas Light Company, to examine and inspect certain books of said corporation, but respondent did not recall, or was unable to say whether the dates and proof of such demands were correctly set forth in plaintiff's petition, and demanded strict proof thereof.

He admitted that he refused, so far as it was in his control, the inspection of the books demanded, but averred that in doing so he acted in good faith on the belief, upon legal advice given, that the said Bourdette, plaintiff herein, under the law as respondent then under-

stood it, had not made a proper demand and had not shown a just and reasonable ground for such inspection; and, in the interest of the corporation generally and other stockholders and parties concerned, and the discharge of his duty, as he understood it, respondent refused said inspection, believing that his refusal under the circumstances was entirely justifiable.

Respondent qualified the foregoing and said that, as a matter of fact, he did at all times agree and offer to permit the plaintiff to see and inspect certain of the books of the corporation of which he, respondent, believed gave all the information to which the plaintiff under his demand was entitled to, but refused only the inspection of certain other books, which respondent believed that plaintiff was not entitled to see at the time and under the circumstances of his demand.

He averred that he had reason to believe and did believe that the plaintiff was actuated by mere curiosity, or sought the inspection as a broker holding shares in his name for other persons than himself for speculative purposes. That the charter and by-laws of the corporation required a full and explicit statement of the business of the corporation to be annually submitted to stockholders at the annual meeting, which had been done to the satisfaction of all parties in interest within a few weeks before the alleged first demand for inspection was made.

He averred that it was not true that even after judgment he did not permit the inspection of the books until a rule for contempt was taken and was threatened with imprisonment, but averred the fact in that regard to be that he, respondent, did exhibit to the plaintiff any and all regular books of the corporation, including the stock ledger, wherein were recorded the purchases and transfers of stocks, the names of the stockholders and the number of shares owned by each. That upon legal advice he believed that the opening of these and all other books was a full compliance with the judgment that had become final, and the rule for contempt was in fact an arrangement between counsel to have a judicial interpretation on the question whether or not under the judgment and the demand on which it had been based the plaintiff herein had a right to demand information of and inspection of what is called a mere book of "memorandum" of transfers of stock made or to be made during the hours of a given day; respondent being advised that such memorandum, which, before the close of the day, were regularly entered in the regular books, could be seen on the following

day, was not one of the books of the corporation, to the inspection of which the plaintiff herein was entitled, even under the judgment.

Respondent averred, however, that he acted in good faith, and specially denied that the plaintiff had suffered any damage from any cause for which he, respondent, was liable.

The District Court rendered judgment in favor of the plaintiff against the defendant for the sum of two thousand three hundred dollars and interest and costs, and the defendant appealed. Plaintiff prayed in the Supreme Court that the judgment be increased to at least \$3,116.

OPINION.

The decision of this court in *State ex rel. Bourdette* (49 Ann. 1556) has definitely settled that the plaintiff was in February and March, 1897, a stockholder in the New Orleans Gas Light Company; that as such he had the legal right to inspect the books of the corporation in aid of a real and actual interest upon which would be predicated the request to inspect the same, and that the company had illegally denied him this right. In that suit, which was a mandamus proceeding to compel the present defendant (then the President of the Gas Light Company) and the Secretary of the company to permit such inspection, the mandamus was made peremptory. There was a very considerable delay before the relator was able to make the inspection.

He subsequently instituted an action against Sieward individually to recover from him the sum of fifty-eight hundred dollars alleged to have been suffered by him by reason of his inability to make such inspection. An exception of no cause of action was sustained by the District Court, but on appeal the judgment of the District Court was reversed and the cause remanded for further proceedings (52 Ann. 1333). The case was tried upon its merits and judgment was rendered in favor of the plaintiff for twenty-eight hundred dollars. The defendant appealed, and it is this judgment which we are called on to consider.

There is no doubt that our previous decision having determined that the plaintiff had been deprived of a legal right, plaintiff is entitled to recover damages against the defendant to some extent. We have held that the violation by a person of the legal rights of another renders the latter liable for at least nominal damages, without proof of actual

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damage. (Dudley vs. Tilton, 14 Ann. 283; Powers vs. Florence, 7 Ann. 234; Bourdette vs. Seward, 52 Ann. 1333.)

The question before us is whether the plaintiff is entitled to recover from the defendant the particular damages which he claims. The only decision in our State called to our attention by the plaintiff is that of Bayne vs. The Union Bank, 9 Rob. 433.

In that case the plaintiff had become the actual owner of a number of shares of the Union Bank by purchase from the Citizens' Bank, and was entitled to have the same transferred to him on the books of the bank, in order to make his ownership available. The bank, without any rights upon or in respect to the stock, refused to make the transfer, the result being that the plaintiff was unable to control his property until some time afterwards, when the stock had become depreciated in value. When he got control of the stock, he sold the same at its market value, and under the judgment of this court recovered the amount of the depreciation in the value of the stock as damages from the bank.

In the case at bar the plaintiff does not claim that the defendant was in control of the ownership of his stock; it was in his own possession all the time, subject to his free power of disposal. What he claims is that by reason of the refusal of the plaintiff to allow him to inspect the books of the corporation his judgment had been affected as to whether he should dispose of his stock or not and at what times he should dispose of it, if he deemed it to his interest to do so. His claim is that, had he had inspection of the books, he would have ascertained that the defendant, Seward, President of the corporation, had recently sold out a large number of shares of the company which he owned; that the Mechanics and Traders Insurance Company, of which Col. Macon (who was a director of the Gas Light Company) was an officer, had also parted with a large block of stock of the Gas Company. That, had he known these facts, he also would have sold out his stock, but, not knowing these facts, he had not only not sold, but had, on the contrary, purchased other stock.

It is not pretended that any inspection of the books of the corporation would have disclosed any action on the part of the officers of the corporation in their management and conduct of its affairs which had caused injury to its business, or any fact which, had it been known by him, would have induced action on his part as a stockholder between himself and the corporation or its officers. Neither the President nor

the board of directors are charged with misconduct in the management of the affairs of the corporation. The plaintiff complains simply of the effect which he says the action of the defendant in selling out some of his shares of stock would have had upon his dealings as between himself and the general public in respect to holding or selling his own stock.

The act of the defendant in selling out his stock was not an official, but an individual act, which the plaintiff had no legal right to question or control. Plaintiff maintains, however, that he was entitled to know the fact itself, so that he could guide his conduct and his judgment as to disposing or of holding on to his stock by what the defendant had done with his own. He insists that had he known that the defendant had sold any of his stock, he would have sold his own at once. What he would have done in the premises rests entirely upon his own testimony to that effect. It so happens in this particular instance that at the date of the demand made by plaintiff to inspect the books and the refusal of the defendant to grant the request, the stock was falling on the market, but this was for reasons entirely independent of the selling out of stock, either by the defendant, or any one else.

The depreciation was due to causes of which the public were very well advised, which had no connection with defendant's sale of his stock, and which it did not require an inspection of the books to know. The stock, after falling, reacted on the market; went for a short time higher than it stood on the day of the refusal of the inspection, but fell again and has remained down.

The evidence shows that the sale by the defendant of his stock was not due to consideration by him of gain or loss in its value, to possible or probable rise or fall, but in order to enable him to pay debts of his own which he had to meet. He did not sell all of his stock, but retained such of it as he did not need. The sale of stock by the Mechanics and Traders Insurance Company had extended over a year's time, and there is nothing to show that it was based upon any inside knowledge of conditions which were calculated to bring about a fall.

It so happens that, had the plaintiff in this case made the action of the defendant and that of the Mechanics and Traders Insurance Company in selling out their stock a test by which he would be guided as to what he should do with his own stock, and he had sold out on the day that the inspection was sought and denied, he would not—as a

matter of accident, viewing the whole situation afterwards from that day to this—have met with the loss he did, but there was a short period at which he would have gained by not selling, and it might well have been that, following blindly in the wake of the defendant's action, he might have suffered material loss.

The stock of a corporation has two values, the actual value which an ascertainment of its affairs would show, and a market value, frequently dependent on any given day upon causes entirely independent of the business management and the actual condition of the corporation. We do not think that for the denial of the officer in charge of the books of a corporation, to permit a stockholder to inspect the same on a given day, he should be held liable to that stockholder for the subsequent falling in value of his stock from collateral cause not due to something which an inspection of the business affairs of the corporation, through the books, would have disclosed, nor do we think that he should be held liable for depreciation of stock from causes of which the general public were advised without the necessity of an inspection of the books.

We have no reason to suppose that the defendant in this case was chargeable with bad faith in his course. He doubtless did what he conceived to be his right and his duty in the premises. We may say here that there is no evidence in the record to show that as an officer of the corporation he had absolute control of the books; his action may well have been controlled by and subordinate to the will of the board of directors.

From a consideration of the whole case, we are of the opinion that the judgment should not stand. The damages claimed are remote, collateral and speculative, and, besides this, are not supported by sufficient evidence.

For reasons assigned herein, it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby amended by reducing the amount thereof to five hundred dollars, and as so amended it is hereby affirmed at costs of appellee.

BLANCHARD, J., dissents, holding that, even if plaintiff be only entitled to recover damages for deprivation of a legal right, the amount allowed is inadequate, considering his large holdings of stock in the Gas Light Company at the time, and the extent and magnitude of the transactions in the shares of that company upon the stock market.

PROVOSTY J., concurs with BLANCHARD, J.

Bank vs. Coco.

No. 14,079

MUTUAL NATIONAL BANK VS. P. J. COCO.

SYLLABUS

1. Where a person who places his signature on a promissory note for the further security of the holder, whether he be considered a surety or co-maker, gives his written consent that the payment of the note be extended to a fixed date, but the extension is not granted by the holder, such consent, regarded as an acknowledgment, has no other date than that which it bears, and the prescription applicable to promissory notes begins to run in his favor from that date, and not from the date to which the consent refers.
2. The mere fact that the holder of a note has failed to sue on it will not justify the inference that he consented to extend the time of payment, in the face of positive testimony to the contrary.

IN RE Mutual National Bank, applying for *certiorari*, or writ of review, to the Court of Appeal, Third Circuit, State of Louisiana.

Richardson & Soulé, and *William H. Peterman*. for Plaintiff, Applicant.

Adolph Vallery Coco, for Defendant, Respondent.

The opinion of the Court was delivered by

MONROE, J. This is an application for the review of a judgment, rendered by the Court of Appeal for the Third Circuit, in the following case:

In October, 1899, the receiver of the plaintiff bank filed suit in the District Court for the Parish of Avoyelles against Paulin J. Coco as "indorser and surety" on two promissory notes, of \$341.55 each, made by C. M. Coco, February 10, 1892, payable in one and two years, respectively, to the order of the maker, and by her indorsed, and bearing the signature of the defendant, written above said indorsement. The defendant filed a plea of prescription of five years, which was overruled; he then answered, alleging that he signed the notes as surety, to the knowledge of the plaintiff, and that he received no benefit therefrom; that by the laches of the plaintiff, the notes had been allowed to become prescribed as to the maker and that he was therefore released. Upon the trial in the District Court the notes were offered in evidence, and it was shown that they were protested at

Bank vs. Coco.

maturity. There was also offered an instrument in writing, signed by the defendant and shown to have been delivered to the plaintiff, which reads as follows:

"Marksville, La., Feby. 27, 1894.

"I hereby consent that the Mutual National Bank of New Orleans, La., give an extension until Feby., 1895, to Mrs. C. M. Coco for the payment of two notes, executed by her in favor of said bank and indorsed by me, dated the 16th day of February, 1892, and made payable one and two years after their date respectively."

(Signed) "P. J. Coco."

Beyond this, the only evidence in the case is that of the counsel for the defendant, from which it appears that the defendant and C. M. Coco had been engaged in business as commercial partners, but that, several years before the notes sued on were made, the defendant had withdrawn and C. M. Coco had retained the assets and assumed the debts of the firm; that in 1893, C. M. Coco had made a settlement with her creditors, paying one-third cash and, for the balance, giving notes, signed by herself, as maker, and by the defendant as surety, and that the notes sued on were among those so given. It seems reasonably certain that the debt represented by the notes was one which had been contracted by the firm before the defendant withdrew, but, whether he was still bound for it when the notes were given is not so clear. In fact, it would appear from the testimony that such was not the case. However that may be, he agreed to sign the notes, and did sign them, for the better security of the party to whom they were given, and, thereafter, as we have seen, he gave a written consent that the date of their payment should be extended to February, 1895. But the only testimony which we have upon the subject is direct and explicit to the effect that, notwithstanding the consent so given, the extension was not granted; the most that is claimed, in rebuttal of this testimony being that, as the bank did not bring suit prior to 1895, it must be inferred that the extension was granted. Such an inference would hardly be justified if there was no evidence beyond that showing the consent of the surety, as it by no means follows that the holder of a note will consent to extend the time of payment because the surety is willing that it shall be done.

Where, however, as in this case, there is affirmative testimony to the effect that "no extension of time was ever obtained," there is still less room for inference.

Under these circumstances, it is clear that the agreement of the defendant, considered as an acknowledgment, has no other date than that which it bears, and that, whether he be regarded as a surety, or co-maker, the prescription of five years, applicable to promissory notes, began to run in his favor from that date. And, as the five years had elapsed, without any further interruption, before this suit was filed, it follows that the claim sued on is barred. C. C. 3540, 3520; Betz vs. Coleman, 23 Ann. 785.

We find it unnecessary to consider the further question which are discussed in the briefs filed. The trial judge held that the plaintiff was not entitled to recover, and his ruling was affirmed on appeal; we have reached the same conclusion, and the judgment which we have been called upon to review will remain undisturbed.

It is therefore ordered, adjudged and decreed that this proceeding be dismissed at the cost of the applicant.

No. 14,106.

STEPHEN W. CHILDS VS. KEETE LOCKETT, SHERIFF, ET AL.

SYLLABUS.

1. A party who has entered upon and is in undisturbed possession of land purchased by him occupies a different position from what he would if he had not yet taken title or possession and was being proceeded against to compel him to do so.
2. A purchaser of land who is in undisturbed possession thereof cannot enjoin executory proceedings issued to enforce payment of the purchase price, on the ground that he acquired no title to his purchase. He cannot hold the property and possession thereof under the title, and prevent the vendor from being paid through sale of the property.
3. A probate sale expressly made upon the petition of tutrix acting as administratrix of a succession to pay the purchase price of property due in its entirety by the succession and secured by special mortgage and vendor's privilege on the property, sold, conveys title to the purchaser, though the sale was not made upon the recommendation of a family meeting in behalf of the minor—heir of the deceased father. Property ordered to be sold for cash and advertised and sold for cash, is not less a cash sale because after the sale the purchaser, by reason of special facts, does not pay the cash.
4. A probate sale of community property in the succession of a father to pay a community debt secured by special mortgage and vendor's privilege upon it, conveys the property to the purchaser thereof free from mortgages standing upon it in the name of the deceased.

107	270
113	247
113	259

Childs vs. Sheriff et al.

5. Community creditors are to be paid by preference and priority out of the proceeds of the sale of community property, over the individual creditors of either of the spouses.
6. The mortgage right of minors upon the property of their natural tutrix, upon community property, are not greater than the rights of the mother herself in that community, and that interest is limited to the residuum after payment of the community debts. (*Heirs of Baillio vs. Polisset*, 3 N. S. 336.)
7. The minor heirs of a father, to whom the mother has been confirmed natural tutrix, cannot enforce the general mortgage which the law gives them against her as tutrix upon her interest in specific community property, which has been sold in the succession of the father to pay a community debt secured by vendor's privilege. The sale extinguishes any right which the wife had in it. The purchaser at such probate sale has no legal ground for fearing disturbance from such a mortgage, particularly when aware of the situation at the time of the purchase.
8. The taking by a natural tutrix of the legal title to certain property does not, of necessity, cause that property to be affected by a general mortgage in favor of her minor children. (*Succession of Manson*, 51st Annual, 180.)

A PPEAL from the Eleventh Judicial District Court, Parish of Red River—*Porter, J.*

Egan and Scheen, for Plaintiff, Appellant.

Pierson and Pierson, for Defendants, Appellees.

STATEMENT OF THE CASE.

The opinion of the Court was delivered by

NICHOLLS, C. J. On the 5th of November, 1889, Robert Stothard purchased a farm, known as the "Bonnie Doon," from L. H. Howard, agent for some absent owners, for the price of three thousand and fifty dollars (\$3,050), for which he paid in cash only twenty-five dollars (\$25), the balance being payable in three instalments, represented by promissory notes secured by special mortgage and vendor's privilege, to-wit: nine hundred and seventy-five dollars (\$975) in two notes, payable January 1st, 1890; one thousand dollars (\$1,000) payable January 1st, 1891, and one thousand and fifty dollars (\$1,050) in two notes payable January 1st, 1892.

Stothard died in September, 1890, leaving all of these notes unpaid.

An inventory of the succession was taken on September 25th, 1890, and recorded on October 1st, 1890.

The widow, Mrs. Emma R. Stothard, was appointed and confirmed natural tutrix on the 1st of October, 1890.

On February 24th, 1892, the tutrix filed a petition in which she alleged that there were some debts and mortgages left by the deceased upon the property falling to the minors and belonging to the community between herself and her deceased husband, some of which she had managed to pay off in part; that there still existed outstanding indebtedness against said property and which it was necessary to provide for; that she was without the necessary means of the said estate to pay the same or to administer the said property for the current year, 1892, and to support and educate the minor children, and that she should be authorized by a family meeting to obtain said loan, and, in order to do so, to execute a special mortgage upon the real property held in common between herself and her children; one of whom, E. Stewart Stothard, was then a major. She accordingly prayed for the holding of a family meeting to so authorize her.

A family meeting was ordered to be convoked and was subsequently held. Its recommendations were in accord with the applications of the tutrix, the *proces verbal* stating that the members found it necessary, for the reasons set forth in the petition, which reasons they endorsed and approved. The proceedings were approved and promulgated.

On the 24th of February, 1892, Mrs. Emma Stothard, as tutrix and widow in community, and E. Stewart Stothard, the major heir of Robert Stothard, under authority of the proceedings of the family meeting, executed before the Clerk of the Parish of Red River, *ex officio* notary, a *solidary* promissory note in favor of John J. Gragard, for two thousand dollars, with eight per cent. per annum interest from date until paid, payable on or before the 1st of January, 1893, and secured payment of the same and the attorneys' fees by special mortgage, with the clause *de non alienando*, upon the "Bonnie Doon" place. The act recited that the widow, the minors and E. Stewart Stothard were indebted to John J. Gragard in the full sum of two thousand dollars for cash borrowed from him under the authorization of the family meeting and the order of court thereon.

On March 12th, 1896, Mrs. Emma R. Stothard, natural tutrix, and as such administering the succession of Robert Stothard, filed a petition in which she alleged that on the 5th of July, 1889, her husband acquired, on the terms of credit specified in the act of sale from L.

M Howard, agent, the farm known as the "Bonnie Doon" place, in which was reserved a special mortgage and vendor's privilege to secure payment of the price.

That the said succession, as well as herself, had been unable to pay or discharge the said price; that she had procured John J. Gragard, who held a second mortgage on said property, to pay, with legal subrogation, a large portion of said purchase price to the said vendors, and there was now due him on said purchase price the sum of seventeen hundred dollars, besides interest; that there still remained due him on said purchase price the sum of seventeen hundred dollars, besides interest, and that there still remained due to the vendors on said purchase price the sum of one thousand dollars, besides interest; that she had no means in her hands to pay said indebtedness, which was long since past due, and said creditors were urgent to receive pay, and refused to extend the time for payment. That it was absolutely necessary that she be authorized by order of Court to make and should make a sale of said property, in order to make payment of the purchase price. She prayed for such order.

An order was accordingly given to sell the "Bonnie Doon" place at auction for cash. Should it not be sold for cash, then on twelve months' credit, according to law. The property was at that time (by recorded act) leased to E. L. Kent for the years 1896, 1897 and 1898, for which the lessee had executed his rent notes.

The property was advertised by the Sheriff to be sold for cash, and at the offering on the 15th of April, 1896, it, together with the lease notes, was adjudicated to Mrs. Emma R. Stothard, individually, for the price of twenty-eight hundred dollars, that being its appraised value. In the Sheriff's deed made on the 28th of April, 1896, it is stated that the purchaser in compliance with her bid had paid the Sheriff the sum of forty-one dollars in full for all costs, and had, in her capacity as natural tutrix of the minors, administering said succession, as such, delivered to him the balance of the purchase price, to-wit: the sum of twenty-seven hundred and fifty-eight dollars, the same being payable to her in her capacity as administratrix for said succession.

On the 30th of April, 1896, by act before Pierson, Notary Public. Mrs. Emma R. Stothard sold the "Bonnie Doon" plantation, together with the lease thereof, to Stephen W. Childs for the price of three thousand seven hundred and twenty dollars, payable in five annual

instalments of different amounts, payable in January of the years 1897 to 1901, inclusive; the instalments bearing interest at eight per cent. per annum from the maturities thereof until paid. These instalments of price were represented by five promissory notes of the purchaser, Childs, for the different amounts and payable to the order of the vendor, and by her endorsed in blank were secured as to payment and attorneys' fees by special mortgage, with the clause *de non alienando* on the property sold. The vendee, Childs, in order to further secure the payment of the purchase notes, pledged the lease notes which Kent, the lessee of the place, had given for the lease of the property for the years 1896, 1897 and 1898, unto and in favor of any future holder of the notes. The parties waived and dispensed with the production of a certificate of mortgages and exonerated the Notary from all liability for non-production of the same.

On the same day, April 30th, 1896, Childs gave a receipt for the rent notes to John J. Gragard, each of which was for the sum of three hundred and fifty dollars, and which were due on the 1st day of December, 1896, 1897 and 1898, and were payable to the order of Mrs. E. R. Stothard and endorsed by her in blank. In this receipt it was recited that these notes had been specially pledged to Mrs. Stothard in her act of sale of that day to him; that the notes were to be collected by Childs and proceeds accounted for to said J. J. Gragard.

Gragard having died, Edward Pierson was appointed administrator of his succession.

On the 13th of September, 1900, Edward Pierson, administrator of Gragard's succession, applied in the District Court for Red River Parish for the seizure and sale, under executory process, of the "Bonnie Doon" place. The order was granted and, under writ of seizure and sale, the property was seized.

The writ issued upon the allegation of the administrator that the succession of Gragard was the holder of four notes which he annexed to his petition, which had been executed by Stephen W. Childs for the payment of the purchase price of the "Bonnie Doon" plantation, bought by him from Mrs. Emma R. Stothard at the sale above referred to.

The petition described the notes, and alleged that Childs was indebted to the succession of Gragard for their amount; that three of the notes were past due and unpaid and had not yet matured; that they were secured by special mortgage and privilege. The petition contained the customary averments of petitions for executory process.

The property was ordered to be sold partly for cash and partly on credit according to law.

Childs, the maker of the notes, obtained an injunction staying the sale of the property. In his petition applying for the same he averred that the succession of Robert Stothard was largely indebted to John J. Gragard; that Gragard in his lifetime was the owner of large indebtedness for the purchase price of the property seized. That Stothard having died, his widow having administered said succession in her capacity as natural tutrix, presented a petition to the District Court and had said property sold for the purpose of paying the said debts due Gragard; that the said debts due Gragard were a first mortgage for \$850 and a second mortgage for \$2,000. That the Court ordered the property sold for cash to pay said debts, but the property was not sold for cash as was authorized by the Court, and no debts paid with the proceeds, nor was there any consideration for the sale, and said sale not having been made as authorized by the Court, was null and void and Mrs. Stothard therefore could not make a good and valid sale. That before any proceedings had been taken to sell said property by Mrs. Stothard, tutrix, John J. Gragard applied to him (Childs) to purchase said property, and for him (Childs) to become the debtor of Mrs. Stothard: that the amount he was to pay for the said property was agreed upon with Gragard, and that, after the agreement had been made. Gragard and Mrs. Stothard employed J. F. Piereson, an attorney at law, to have made to petitioner a valid and good title to said property, free from any incumbrances other than the vendor's privilege which was to be retained for the purchase price.

That, relying upon the representations of all said parties and of said attorney at law. that he was acquiring a good and valid title to said property, free from all incumbrances. he executed his notes for the purchase price of said property to Mrs. Stothard or any future holder, but in reality to J. J. Gragard, with whom he had made the trade for the property, and who he understood was to receive the said notes in lieu of the indebtedness due to him by the succession of Robert Stothard, and cancel the prior special existing mortgages. That Gragard never did receive the notes given by him (Childs) in lieu of the said indebtedness of Robert Stothard, but only took them as collateral security for the indebtedness existing, and still holds and owns the said original notes for the purchase price, and that the two special mortgages were never canceled and satisfied; and, while Gragard was

a party to the whole transaction, he never carried out the terms of their agreement by having canceled the special mortgages and other incumbrances.

That said parties acted in bad faith and fraudulently sold said property, burdened with two special mortgages and with a legal mortgage resulting from the recording of the abstract of inventory in the tutorship proceedings of the minors of Robert Stothard, in the mortgage records of the Parish of Red River, for more than \$9,000, and which was also recorded prior to the sale made to him. That the mortgage records showed still standing against this property the two special mortgages for \$2,050 and the legal mortgage for more than \$9,000 in favor of the heirs of Robert Stothard, and the natural tutrix had never made a settlement with said heirs in whose favor this legal mortgage exists. That some of the heirs have already threatened to enforce the legal mortgage in their favor against the property to the amount due them. That he did not know what amount might be due said heirs, but that said incumbrance was still standing against said property and he had been threatened with eviction by the enforcement of the legal mortgage.

That, relying on the representations made to him, that he thought the title good, when he first became informed that it was burdened with the special and legal mortgages, he notified Gragard, with whom he had made the trade, that the same existed and that it was his duty to have the same removed and the title perfected, which Gragard had refused to do. That Gragard was not a purchaser in good faith before maturity of the notes, but a party to said transactions, and that he only holds the notes as collateral security, and they still remain the property of Mrs. Stothard. That the consideration for the notes and mortgage was a good and valid title, free from all incumbrances, and the consideration for the notes had failed, on account of the existing special and legal mortgages, and the defective title arising therefrom and the sale. That neither in law nor equity was the plaintiff entitled to collect said notes until the mortgage resting upon his property had been canceled and satisfied and he (Childs) quieted in his title and freed from threatened eviction from the property; that he was entitled to an injunction to preserve his rights. He prayed for an injunction directed to the Sheriff and to Pierson, administrator of the succession of Gragard, restraining them from further proceed-

ing to seize, advertise and sell said property. He prayed for citation on the first said parties.

That on a final hearing the writ of injunction be perpetuated and that he have judgment prohibiting the administrator from further proceeding in the collection of said notes sued on until said mortgages and incumbrances shall have been removed from the property, and until he shall have been given a clear and unincumbered title and his danger of eviction had been removed. He prayed for all necessary orders and for general relief.

The only parties to the litigation were the plaintiff, the sheriff and the succession of Gragard. The administrator of Gragard's succession, under reservation of exceptions, answered. After pleading the general issue, he admitted that Mrs. Stothard administered the succession of Robert Stothard as natural tutrix. He averred that said succession was indebted in a large sum to John J. Gragard for the purchase price of the Bonnie Doon place, which Stothard had purchased; that the object of Mrs. Stothard's application made to the Probate Court was to pay the large indebtedness due Gragard, then amounting to more than its value, and that it was sold for that purpose.

He averred that the succession was really benefited thereby. He admitted that before the probate sale of the place, Gragard negotiated with the plaintiff to become a purchaser of the same on advantageous terms for a sufficient price to cover the indebtedness of the succession to him; that Mrs. Stothard became the purchaser at the probate sale for the purpose of making the title over to plaintiff on the terms and at the price set forth in the act of sale from her to him, and that the rent notes of Kent, the lessee, and the purchase notes were turned over to Gragard with the view of providing for the payment of the debt of the succession to him and the ultimate discharge of the succession from said indebtedness.

He avers that this arrangement was made in good faith and in the interest of the succession which was largely benefited thereby; that the property at that time could not have been sold in the regular course for a sufficient sum to satisfy the indebtedness of the succession of Gragard, and that the arrangement with the plaintiff was to secure a price for the property which would satisfy said indebtedness and leave the residue of the property of the succession disencumbered from said indebtedness. He admitted that he holds the purchase notes of the plaintiff, Childs, for the payment of the indebtedness of the

succession of Stothard, and that payment by Childs of the notes in suit will discharge the indebtedness of that succession to the succession of Gragard. He specially denied that plaintiff was threatened with eviction from the property referred to, or that he had any just or legal grounds to fear or apprehend such eviction, if he pays his own notes, as promised, and complies with his own obligations. Assuming the position of plaintiff in reconvention, he alleged that the injunction had been illegally taken out; that the succession had been greatly injured thereby, and he prayed for its dissolution, with damages *in solido* against the plaintiff and the sureties on the injunction bond.

The District Court rendered judgment in favor of the succession of Gragard and against the plaintiff.

It decreed that the demands of the plaintiff be rejected; that the writ of injunction which had been issued be dissolved and set aside, with leave to the Sheriff and the defendant administrator to proceed with the execution of the writ of seizure and sale, which had been enjoined.

It gave judgment in reconvention in favor of the succession of Gragard against the plaintiff for the sum of two hundred and fifty dollars for attorneys' fees incurred in dissolving the injunction, and the sum of sixty-five dollars for keepers' fees and four dollars for advertisement and judgment for costs.

Plaintiff appealed.

The facts of this case appear fairly well from the pleadings of the different parties. In November, 1889, Robert Stothard purchased the Bonnie Doon farm for the price of three thousand and fifty dollars, of which he paid only twenty-five dollars cash, the balance being represented by notes secured by special mortgage and vendor's privilege on the property.

He died in September, 1890, leaving these notes unpaid. The property was community property and the debt a community debt. The widow of Stothard qualified as natural tutrix of the minors, issue of her marriage, and as such administered the succession. An inventory of the succession property had been taken and recorded prior to her appointment as tutrix.

John J. Gragard had been the commission merchant of Stothard and continued to be that of the tutrix after his death.

In February, 1891, he took up the two notes, aggregating \$975, which became due in January, 1890, and canceled to that extent on

the records the mortgage and privilege which secured payment of the price of the plantation.

In 1892 Mrs. Stothart executed a special mortgage on the Bonnie Doon farm to secure this debt to Gragard; Stewart Stothart, one of the children of Robert Stothart, who had reached majority, joined in this mortgage, which was executed upon the recommendation of a family meeting and an order of Court homologating the same.

At that time the instalments of the purchase price, to the amount of \$1,050, which fell due in January, 1892, was outstanding. Gragard took these notes up, so that he had paid the entire purchase price of the property with the exception of twenty-five dollars.

In 1896 the Bonnie Doon farm was sold by the Sheriff under an order of the District Court, upon the petition of the tutrix, to pay debts, and evidently under her pleadings to pay this debt to Gragard.

In the meantime the plantation had been leased to E. L. Kent, for 1896, 1897 and 1898, for which he had given rent notes. At the Sheriff's sale referred to the property with the rent notes were adjudicated to Mrs. Stothart individually for the sum of twenty-eight hundred dollars. She paid to the Sheriff the costs of the proceeding and gave him her receipt, as tutrix administering the succession, for the balance of the price of adjudication. The rent notes were at the time held in pledge by Gragard for payment of her debt.

The title having been placed in the name of Mrs. Stothart, she, on the 30th of April, 1896, sold the property, with the rent notes, to the plaintiff, entirely on credit, the price being represented by the purchaser's promissory notes for different amounts payable at different times at extended intervals, secured as to payment by special mortgage and vendor's privilege on the property. After this sale Gragard delivered the rent notes to Childs under an agreement that the latter should collect the same and transmit the proceeds to Gragard to be by him applied *pro tanto* to the payment of the debt of the succession to him, and this was accordingly done.

It appears that before this Sheriff's sale took place, an agreement had been entered into between Gragard, Mrs. Stothart and Childs in regard to the proposed sale. As Childs did not go upon the stand as a witness, and Gragard has in the meantime died, the precise character of this agreement is not shown, but it is fair to assume that what afterwards took place was done in execution of the same. Childs, in his petition for injunction, admits the existence of an agreement.

After Mrs. Stothart had transferred the property to Childs, she turned over to Gragard the promissory notes which he had given for the price

Childs not paying the notes, the administrator of the succession of Gragard reciting the facts and annexing the notes, caused the property to be seized by executory process under an order of the District Court. Childs enjoined the sale, praying that the administrator be prohibited from further proceeding in the collection of the notes sued on until all mortgages and encumbrances on the property shall have been removed from the property, and until he be given a clear title and unincumbered and his danger of eviction has been removed. In his petition for injunction he referred to the sale of the property by the Sheriff at which Mrs. Stothart became the adjudicatee, declaring it null and void for the reason that it had not been authorized to be made by advice of a family meeting in behalf of the minors, and that it had not been sold for cash as the Court had ordered it to be sold; he averred that Mrs. Stothart had acquired no title to the property at the sale, and could not and had not conferred title to him; that there was danger of his being evicted from the property of the children of Stothart, and that the consideration of his notes had failed. These allegations are followed up by no prayer predicated upon them. He does not offer to return the property, praying that the sale to him be set aside and that his notes be canceled and returned. In his petition he refers to the fact that Mrs. Stothart had been appointed natural tutrix of the minors; that an inventory of the property of the succession had been recorded showing property to an amount of more than nine thousand dollars, giving rise to a general mortgage for that amount on all the property of the tutrix and on this particular property.

That there was danger to himself from the possible and probable enforcement of this mortgage, against which danger he was entitled to be fully protected by non-enforcement of his notes until the danger had been removed; that he had been threatened with a suit in enforcement of this general mortgage. Childs took possession of and has been and now is in undisturbed possession of the property he purchased. There is nothing in the record to indicate that in the future children of Robert Stothart propose to attack the sale to him, and nothing to show that they will ever undertake to enforce any mortgage which they may have against their natural tutrix upon this particular prop-

erty or any portion of it. The evidence shows that she has other property. The plaintiff has never personally paid a cent upon his purchase price, though during his ownership the property itself has paid the amount represented by the rent notes of Kent, the only amount paid upon the property, either by Stothart or his succession, has been the sum of twenty-five dollars. All the balance has been paid by Gragard.

The succession of Gragard is not seeking in the present proceeding to obtain a personal judgment against Childs. It is a proceeding directed against the Bonnie Doon plantation and substantially and practically (though not in direct form) a proceeding to make that property itself pay the price which Robert Stothart had agreed and bound himself to pay for it when he purchased it. Plaintiff avers that Mrs. Stothart acquired no title through the Sheriff's adjudication to her, for the reason that it was not sold for cash, as it was directed to be sold by the Sheriff, and because the sale was not made under advice of a family meeting. (He refers the Court to Succession of Weber, 16 Ann.) In that case defendant, after becoming the adjudicatee of property of a succession, refused to carry out his agreement, and suit was brought to compel a specific performance. The grounds which are set up in the present proceeding might have been deemed sufficient to justify him in not taking title, had that been the issue here, but he has taken title and gone into possession thereunder, and that fact alters the situation materially from that occupied by the parties in the Succession of Weber. The plaintiff is mistaken in affirming that the property was not sold for cash. It was so adjudicated. The fact that after the adjudication the price was not paid cash is something other and different from its not being sold for cash. Had any third person become the adjudicatee he would unquestionably have been compelled to comply at once with his bid. An adjudicatee at a sale may occupy such relations toward the property sold or towards the parties who are to receive the money arising from the sale as will justify the Sheriff, and, in fact, sometimes prevent him from enforcing a cash payment of the bid. That is a matter of frequent occurrence. The plaintiff urges that there is danger of eviction from a claim made for the property by the children of Stothart. Let us vary the situation somewhat and see how those children stand in respect to this property. Let us suppose that Gragard had been still alive and purchased, himself, at the Sheriff's sale, and Stothart's children had

brought a direct action against him to recover the property. They would in such a suit occupy the same position as did the children of Ingram in the case of *Ingram vs. Laroussini*, 50 Ann. 78.

Ingram had purchased property for which he had not paid a cent up to the time of his death, the price being represented entirely by his promissory notes secured by special mortgage and vendor's privilege. Thompson acquired these notes. The widow qualified as tutrix, and at her instance the property was sold to pay debts. Thompson purchased at the sale, and subsequently sold to Laroussini. The children of Ingram, without offering to pay the purchase price due by their father, brought an action against Laroussini to recover the property, urging various objections against the Sheriff's sale, carrying with them, it was maintained, the nullity of the sale. Laroussini called Thompson in warranty. In deciding that case, this Court said: "Plaintiffs' demands are utterly without equity. At the sale which they seek to have declared null the holder of the vendor's privilege notes (representing substantially the rights of the vendor himself) by purchasing the property simply regained the ownership of the property, on which not one dollar has been paid up to the present day. If the sale passed no title to the adjudicatee, plaintiffs' proposition is that they can wrench this property out of the ownership and possession of the purchaser through the law, without paying a cent for it.

"The law works out no such result through force of a provision in a statute which was intended to protect the actual interest of minors, and not to enable them to enrich themselves at the expense of their father's creditors."

What was said there in a direct action for the annulment of a sale by the heirs of Ingram can be said with additional force to one who, being in undisturbed possession of property which had been sold at a succession sale to pay its price due by the deceased and which had subsequently purchased, under substantially and practically an agreement to pay that price himself, should seek to attack collaterally his own title and to avoid carrying out his own obligations by imagining what the heirs of the original purchaser might attempt hereafter to do.

We need not specifically refer to the difficulties which the heirs of Stothart would encounter were they to bring such an action, nor to the defenses by which the present plaintiff could resist the attack upon the title. It is sufficient to say that plaintiff's apprehensions, under the circumstances of this case, are not of character such as to warrant him

in preventing the sale of the property to pay practically the original price due upon it.

The plaintiff urges that he is likely to be evicted from the property through an action by the minor heirs of Stothart in enforcement on this property of the general mortgage securing proper tutorship which the law has given them on her property.

We have already said that there is no evidence of any intention on the part of those heirs to attempt to enforce their mortgage on this property under the relations which their father, their mother and themselves have stood and still stand towards it. It must be remembered that not only did the debt held by Gragard represent the price of the property which had been agreed to be paid by Robert Stothart and which was secured by special mortgage and vendor's privilege thereon, but that that price was a community debt resting on community; that community debts are paid by preference and priority out of the proceeds of community property; that under a mortgage attaching to the wife's interest in community property the rights of the mortgagee are limited to what may remain due after payment of the community debts and a liquidation of the community (8 N. S., 336; Heirs of Baillie vs. Poisset); that when community property is sold in the succession of a father to pay community debts, the purchaser takes it free from any general mortgage resting on it in favor of the heirs of the father by reason of the mother having, prior to the liquidation of the community and the payment of community debts, been appointed and confirmed as their tutrix. Their rights are subordinate to the rights of the community creditors.

Plaintiff says that Mrs. Stothart's having taken the title makes a difference in the situation, but we do not think so. Neither she nor the heirs can by any act of theirs cut off the rights of the community creditors; besides, on this particular instance, she was never really the owner of the property through the sale. Her taking title was simply a step in the direction of carrying out at once the agreement which was made between Gragard, Childs and herself individually and as tutrix that Childs should become the owner of the property, give his notes therefor, and, on payment of the same, the debt of the succession to Gragard should be extinguished. The fact that a tutor may stand on the records as the owner of certain property does not carry with it necessarily that the general mortgage securing the fidelity of

her tutorship in favor of her children should strike it. (Succession of Manson, 51 Ann. 130.)

We are of the opinion that Childs knew perfectly well the exact situation and took title and entered into obligations advisedly in the premises. He waived the usual certificates of mortgage showing that instrument was not needed by him for information. Plaintiff complains that Gragard did not cause the registry of the mortgages held by him to be erased, but we see no force in that objection. If the Sheriff's sale was a valid probate sale, these mortgages were extinguished thereby and transferred to the proceeds; if not, their continuing upon the records could not injure and might be useful to the plaintiff. Be that as it may, if he pays his own notes, he can control the question of their registry.

For the reasons assigned, it is ordered, adjudged and decreed that the judgment appealed from is correct, and it is hereby affirmed.

Rehearing refused.

MR. JUSTICE MONROE concurs in the decree.

MR. JUSTICE PROVOSTY, not having heard the argument, takes no part.

No. 13,822.

STATE OF LOUISIANA VS. FRENCH OPERA ASSOCIATION, LIMITED.

SYLLABUS.

Act 171 does not authorize the levy or collection of a license from the owner of property for the carrying on of an occupation or business by his lessees, in which the owner himself does not participate.

A PPEAL from the Civil District Court, Parish of Orleans.—
Ellis, J.

Hugh C. Cage, for Plaintiff, Appellant.

Denegre, Blair & Denegre, for Defendant, Appellee.

The opinion of the court was delivered by

NICHOLLS, C. J. The State Tax Collector, from the Second District of the City of New Orleans, claims from the defendant four hundred dollars, with interest and attorney's fees, as a license for conducting

the business of keeping an opera house in the City of New Orleans, alleging that the number of seats therein exceed one thousand.

The defendant, after pleading the general issue, alleged that it had been for a number of years the owner of a building known as the French Opera House, but specially denied that it had ever been engaged in the business of keeping an opera house, or of managing, conducting, or carrying on or attending to as a business, the running of an opera house or theatre, or other such place of amusement, or entertainment, or of giving operatic performances. That the license tax which the State seeks to exact from it is illegal, because Act No. 171 of 1898 does not authorize the levy or collection of a license tax from the owner of property for a business or occupation pursued by the lessee thereof. Alternatively it alleges that if the license tax claimed is authorized by the license law of 1898, it is unconstitutional, as violative of Article 229 of the Constitution, which provides that a license shall be levied only on occupations, and can be collected only from the persons actually pursuing same.

The defendant is a corporation the object of whose organization, by its charter, is declared to be "the cultivation of an improved and general interest in all matters relating to literature, the opera and the drama, and to these ends to erect or buy and maintain a theatre, wherein the productions of the best authors and composers may be presented with all advantages of such music, decorations, etc., as may be calculated to represent the said works in the most perfect manner possible."

The fifth article of the charter provides that it "shall not engage in the business of giving performances or exhibitions, but shall lease the buildings and appurtenances, scenery, etc., to other persons for such purposes." It is not charged that the defendant had violated this prohibitory article of its charter, either directly or indirectly, by receiving a portion of the proceeds of any performances in the opera house of which it is shown to be the owner. Defendant has shown, affirmatively, that it has not done so. All that it has done has been to lease its buildings to lessees, who themselves have conducted the business of carrying on operatic performances.

The parties who pursue that business are liable for the license, not the lessors of the building in which the entertainments are given. The defendant is liable for the taxes on the building, not for the license taxes due by the occupants of the building.

The judgment appealed from is hereby affirmed.

No. 13,859.

107 286
d120 199

HEIRS OF PETER MORAN VS. SOCIETE CATHOLIQUE D'EDUCATION RELIGIEUSE ET LITERAIRE DE LA NOUVELLE ORLEANS.

SYLLABUS.

Plaintiffs, as heirs of their father, sue the defendant on a certificate of deposit.

The defendant received a number of deposits; at the instance of the depositor, the account was changed from daughter to father at the latter's request.

In the different transactions between the parties, a certificate remained uncalled for and was found among the father's papers many years after his death. The testimony of the treasurers who kept the defendant's books at different dates and the entries in the books to which they referred and swore, while testifying, as well as the utterances of at least one of the plaintiffs, before suit was brought, show that, owing to carelessness or oversight on the part of defendant's treasurer at the time, the receipt remained outstanding.

The court holds that only one account was kept, and only one line of deposits, and not two, as contended by plaintiffs.

The sums carried on this account, as due to plaintiffs, have been paid, and the receipt they hold is without consideration.

A bookkeeper may consult his books to refresh his memory and testify to facts of which he has therein kept a record.

The name of the depositor was not changed with the view of committing a wrong. The request of the one in whose name the deposits were credited, and the acquiescence of all concerned, leads the court to hold that change in name of the depositor was not made without the assent of all concerned.

A witness is not absolutely discredited because he does not recall that he has signed a receipt representing a large balance. A witness' testimony, if he is in good faith, may be unreliable as to a particular fact and not as to other facts.

A PPEAL from the Civil District Court, Parish of Orleans.—
King, J.

Charles Louque, for Plaintiffs, Appellants.

McCloskey & Benedict, for Defendant, Appellee.

The opinion of the Court was delivered by

BREAUX, J. Plaintiffs seek to recover the amount of a certificate of deposit issued to their late father by the defendant.

They set out in their petition that their father died on the 2nd of May, 1892; that on the 12th day of March, 1899, their late father

Heirs of Moran vs. Catholic Society.

deposited with the Societe Catholique d'Education Religieuse et Litteraire de la Nouvelle Orleans, through A. Arque, its treasurer, the sum of forty-seven hundred dollars, for safe keeping, at his own risk, and subject to his call, as is shown by a receipt.

Defendant denied the averments of plaintiffs' petition. During the trial an amended and supplemental answer was filed, in which defendant pleaded that from time to time money was deposited by the late Peter Moran. Some of it was invested by defendant. Payments were made to the heirs of Peter Moran and to himself, and the account was closed the 16th of July, 1892; that the receipt sued upon was not called back and returned to the defendant, although the money it evidences had been paid; that a full and final settlement of the account had been given to the plaintiff at the time when all the facts were familiar and fresh in the minds of the parties defendant, and that plaintiffs are bound by their acquiescence.

The judge of the District Court rejected the demand. From the judgment plaintiffs appeal.

The facts give rise to the important issues. In order to determine whether the amount received has been returned, we have made as close an analysis of the facts at issue as we possibly could. The genuineness of the receipt before referred to is not denied, but defendant contends that it has been paid in full.

The first witness who testified (one of the daughters of the late Peter Moran) said that she found this receipt with other papers in one of the vest pockets of her late father about five years after his death. The papers were handed to a member of the bar, who in looking over these papers, had his attention attracted by this receipt, and called the attention of one of the plaintiffs to its value as evidence of the amount it represented, to-wit: forty-seven hundred dollars.

The treasurer of the society, by whom this receipt had been issued, had returned to France. She wrote to him about it, and she testified that she received no answer from him, and that she knew nothing of his writing to anyone else. A letter was produced by counsel for the defendant, and evidence afterward introduced showing that a copy of a letter received from the ex-treasurer by the treasurer at the time was sent to this witness; this letter of the ex-treasurer gave some of the details regarding the amounts claimed as due.

Plaintiffs objected that the letter was a mere ex-parte statement. The court ruled that it was not admissible unless it was shown that

plaintiffs had knowledge of this letter. The testimony of the ex-treasurer having been taken by commission, we have given no weight to this letter, although the ruling was proper as stated, to the extent that its contents were known to plaintiffs.

This witness, resuming the trend of her testimony, after the District Judge had ordered this letter to be filed in evidence, stated that she had drawn money from defendant from time to time, beginning in 1882; the amount she did not recall, but she remembered having withdrawn the balance on July 16th, 1892, at which time the ex-treasurer, Arque, was not here, having left this country in the year 1889. She also testified that when the receipt sued on was presented for payment, the treasurer, Rev. N. Davis, told her they had never kept books. She further swore that all receipts issued by the defendant had been returned; that the necessity of the return had often been urged when they called on the defendant on business.

The four sisters, daughters of Peter Moran, had, at different times, drawn money from the defendant. A statement furnished to plaintiffs by the defendant through the last treasurer named above obtained from plaintiffs and introduced in evidence, over plaintiffs' objection, the court ruling, properly, as we think, that the objection went to the effect and not to the admissibility.

Witness, resuming, testified regarding an account she claimed her father had with the defendant for amounts deposited with him, but really knew nothing of any deposit save that which is evidenced by the receipt upon which suit was brought. This witness complained because the money, some eight or nine thousand dollars, in which it seems the four sisters had an interest, had been transferred from the account of Maggie Moran, one of the sisters, to that of the father, without their knowledge and consent; that their father had no right to any part of this fund.

From the testimony of the plaintiffs, we conclude that they had the amount before mentioned in deposit with the defendant; that it was handed to them, part of it by their father and mother, and that it was deposited by Miss Maggie Moran. They withdrew the entire sum; and that, years afterward, the receipt sued on was found by them; that they did not know whether or not their father had made any deposit of money and that he owned any money at all save that in which, we infer, he may have had an interest, although deposited in the name of his daughter. The father of these young ladies had not

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always been successful in business and toward the end of his days he had become a traveling salesman for a large commercial house.

On the part of the defendant, Rev. N. Davis testified that in 1880 he succeeded the treasurer, Rev. A. Arque, who left for France about that time, and that when he took charge of defendant's treasury he found a balance in favor of the Misses Moran of forty-eight hundred dollars, which he paid to them.

Plaintiffs' contention is that there were two deposits, one in the name of Maggie Moran and the other in the name of Peter Moran, represented by two certificates, one handed to the former and the other to the latter, and that the defendant is in error in seeking to impute payment made to Maggie Moran on the certificate which was issued to Peter Moran.

Rev. Mr. Arque, ex-treasurer, testified that in 1888 he transferred a comparatively small balance to the credit of Peter Moran at his request, who had previously made the real deposit in the name of his daughter; that deposits were sometimes withdrawn by the Misses Moran, and sometimes by the father. When one of the family called for any part of the deposit, treasurer Arque would require the old receipt, compare it with his books, and afterwards hand over the amount called for to the one calling for it, and that he, the treasurer, after taking up the receipt handed to him by the one calling for money, would destroy it and issue another. The new balance was then represented by a new receipt. He does not recollect having issued the receipt upon which the suit was brought. But, with some particularity, swears that on the 1st of October, 1888, the father of the plaintiffs, Peter Moran, had five thousand dollars to his credit; that on the 13th of February he withdrew two hundred dollars, and on the 12th of March one hundred dollars, leaving the exact balance of the receipt and corresponding with its date.

On the 27th of March, following, fifty dollars was withdrawn. On the 18th of May, Peter Moran deposited three hundred and fifty dollars, and on the 19th of July, one hundred and eighty-nine dollars was withdrawn, leaving a balance on that day of four thousand eight hundred and twelve dollars. This was the balance this witness left in the treasury of the defendant. This witness testified in substance that he had not received a cent from the late Peter Moran, which was not accounted for in the account kept by him, witness, and which ends, so far as he is concerned, with the balance just stated.

To sustain plaintiffs' contention, we would have to hold that on the 12th of March, 1889, the treasurer had two amounts, each for forty-seven hundred dollars; one due by him to the daughter and the other to the father. We have seen that the amount has been paid to the daughter at different times. The present treasurer, Rev. Davis, has established that fact beyond all question. His testimony leaves no ground to suspect that she has not been paid as he swears. Yet plaintiffs claim identically the same amount as due to their late father. His predecessor, as treasurer, swears positively that no other sums were deposited save place reliance on the receipt in question, which is not conclusive, particularly under the circumstances. It was found many years after the death of plaintiffs' father. After it had been found, they kept it many years in their possession before bringing suit. The youngest of the plaintiffs, who is also a witness, in conversation with one of the members who serves his church as pastor, or sexton, said to him: "Brother, you don't owe us anything." some time before the suit was brought.

If the amount was not paid to Maggie Moran, as contended by defendant, and as the facts appear to warrant the conclusion, then the treasurer, Arque, must have received the amount and retained it, for it nowhere appears that it was ever turned over to the plaintiffs. Of course, the defendant would be responsible if its treasurer had thus appropriated the amount, but we are not convinced that such an appropriation could have been made.

The late Peter Moran lived some three years after this receipt had been given. He was on intimate terms with the members of the defendant society and called on them frequently. He spoke of wishing to save something for his old age and the support of his children. Before he died, the amount on the only account (which was kept in his own name, and not that of his daughter) by defendant had been reduced to less than fifteen hundred dollars. No one ever heard him mention anything about another and larger amount to his credit in the hands of the defendant. We are not inclined to the conclusion, on the evidence before us, to hold the defendant bound for an amount as having been unaccounted for by its treasurer.

All witnesses not discredited in some way, stand as to veracity on about the same plane. Owing to an unfaithful memory, or for any

other legitimate cause, witnesses may err, and when this becomes evident the testimony no longer has weight. Here we have not found that it was possible to conclude that error had been committed by either of the treasurers in regard to the facts to which each had testified.

With reference to the first in date of service upon whom the responsibility rests, he was sixty-seven years of age, less a few months, when he testified. He was spiritual prefect and librarian of a free school in France. While here, he was librarian, professor of French; spoke occasionally in the pulpit, as minister, and was book-keeper and treasurer. Under the circumstances, it would be difficult to conclude that any priest, preacher, minister, or rabbi of any church, or any other witness of good standing or repute as to that matter, would deliberately testify to a falsehood and take from the children of one who was his friend an amount earned for them by his own toil.

We think that money was deposited with defendant, of which an account was kept; a receipt was issued and, through forgetfulness, it was not returned, and that the amount was paid back on other receipts without requiring the old to be produced.

We agree with the learned counsel of plaintiffs, that books of the defendant were not admissible in evidence. These books had been kept by the treasurer up to the date before mentioned. But he could be heard to testify as to the correctness of the entries therein and to his act as book-keeper, by refreshing his memory by referring to his own books, particularly in view of the fact that more than ten years had elapsed since these accounts had been kept by this witness.

The witness, Rev. Mr. Arque, testifies that he was, personally, always opposed to deposits, but that he was not the president. In the presence of an unfounded hope which the receipt he issued, owing to carelessness of some sort, had given rise, it is to be regretted that the good advice of this witness was not heeded.

The District Judge saw and heard the witnesses. We have carefully read the testimony and found no good reason to reverse the judgment.

By reason of the law and the evidence being in favor of the defendant, the judgment appealed from is affirmed.

Rehearing refused.

No. 14,245.

MICHAEL MCSWEENEY VS. J. BLANK & CO., ET ALS.

SYLLABUS.

1. An appeal bond, executed for the amount fixed by the court, is good for a devolutive appeal, even if insufficient for a suspensive appeal.
2. Objections to an appeal bond urged in a motion to dismiss the appeal should be specific; those relating to the competency and solvency of the sureties should be made and disposed of in the lower court.
3. Where an appeal is taken by and in the name of a commercial firm, there is no necessity for the names of the individual partners to be given in the bond. Who they are, appears in the record.
4. If an appeal bond be couched in language such as will enable the appellee to enforce it in manner and form, and to the extent the law directs, the appellee has no occasion to complain. Judicial bonds are tested by the law directing them to be taken. That which is superadded must be rejected, and that which is omitted supplied.

A PPEAL from the Civil District Court, Parish of Orleans.—*Ellis, J.*

E. C. Kelly, for Plaintiff, Appellee.

George W. Flynn, for Defendants, Appellants.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

NICHOLLS, C. J. Plaintiff and appellee moves to dismiss the appeal taken in this case, on the following grounds:

1st—That the appeal bond herein filed is not good and sufficient and such as the law requires.

2nd—That the sureties on said bond are not good and solvent and such as the law requires, nor is it therein stated how, in what manner or for what amount they respectively bind themselves.

3rd—That the condition upon which the said appeal was granted has not been complied with by said defendants, in this, that a bond for such appeal, such as required by law, has not been furnished by said defendants, or any of them; that no bond at all has been given by the defendants John Blank, Frank A. Wilke and Frederick J. Swoop, indi-

vidually, nor are they individually named as principals in the bond that has been filed.

4th—That John Blank, one of the sureties on said appeal bond, is himself a defendant condemned in the judgment, and is therefore disqualified and incompetent as surety on said bond.

That the transcript herein filed is not a full and complete record of the case and does not contain all the evidence therein offered and filed.

Plaintiff sued and obtained judgment against the defendant company and the individual members thereof, for the sum of two thousand and eighty-nine dollars, with legal interest, less one hundred and sixteen dollars allowed them on their reconventional demand.

The defendants obtained an order for a suspensive appeal upon their furnishing bond in the sum of three thousand dollars.

An appeal bond was executed for three thousand dollars, signed by John Blank & Co., John Blank, Joseph Chaussey and James J. Boulet.

The bond reads: "That, whereas we, J. Blank & Co., defendants in suit, as principals, and Joseph Chaussey and James J. Boulet and John Blank, as surety, are held bound to Thomas Connell, clerk of the Civil District Court for the Parish of Orleans * * * in the sum of three thousand dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators firmly by these presents. Dated, etc. * * * Whereas, the above bounded J. Blank & Co. have this day filed a motion of appeal from a final judgment rendered against them in the suit of Michael McSweeney vs. J. Blank & Co., No. 50,662 of the Civil District Court for the Parish of Orleans, on the 17th day of October, 1901.

Now the condition of the above obligation is such that the above bound J. Blank & Co. shall prosecute their suspensive appeal and shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied by the proceeds of their estate or personal property if they be cast in the appeal; otherwise that the said John Blank, of this city, and Joseph Chaussey and James T. Boulet, sureties, shall be liable in their place."

Appellee alleges in several portions of the motion that the bond executed and filed is not good and sufficient and such as the law requires. "That a bond for such appeal, such as required by law, has not been furnished by said defendants or any of them." It was his duty to inform the court in what respects the bond was deemed by him defective.

He can scarcely expect us to analyze it and to detect and to possibly originate objections for him.

The specific objections he urges we shall consider. He says that the sureties are not good and sufficient; but we have no evidence before us on which we would be justified in saying the sureties were not competent. That was a question which should have been raised and disposed of in the District Court. The law fixes how and in what manner judicial sureties are bound; there is nothing on the face of the bond by which the parties have sought to vary its terms and requirements in this particular instance. The sureties are each bound for three thousand dollars; no one of them has attempted to limit his liability to an amount less than that.

Appellees claim that the appeal should be dismissed because John Blank, Frank A. Wilke and Frederick J. Swoop, the individual members of the firm of J. Blank & Co., have given no bond, and because they are not named individually in the bond.

The individual members of the firm were at liberty not to appeal nor to perfect an appeal in their individual names, if they thought proper. The plaintiff has no right to force them to appeal. The commercial firm had the right to appeal, whatever course might be the course which its members individually should think proper to pursue in respect to the litigation. Appellee certainly lost nothing by their not appealing. There was no necessity for their names to have been specially and separately mentioned in the bond. The firm appealed and signed the appeal bond. The record disclosed who the parties were. We judge from the appellant's brief that the appellees object that the bond is too small for a suspensive appeal. It was for the amount fixed by the judge and sustains at least a devolutive appeal. It is not necessary to consider whether John Blank was a competent surety or not, as there were two other sureties; besides, that question should have been raised and disposed of in the District Court, and not urged here for the first time.

We will not dismiss an appeal *in limine* upon the ground that the transcript is defective; we postpone action upon that matter until after we shall have ascertained to what extent, if any, the incompleteness of the transcript will affect the legal situation.

The appeal is maintained.

Note.—Appeal subsequently discontinued by consent.

No. 13,915.

107 295
119 691

GUSTAVE D. REVOLL VS. STROUDBACH & STERN AND EDWARD DUFFY, SR.

SYLLABUS.

1. The purchaser of real estate bought by a married woman in her own name and evidently with her paraphernal funds is without good ground to urge that the property was a community asset in the presence of the fact that the testimony establishes that it was not.
2. A title to immovable property formerly bought by a woman whose name in the act is preceded by the letters "Mrs." and subsequently sold by her in an act wherein nothing leads to the inference that she was married, and in view of the fact that other testimony amply sustains the contention that she was not married, is unquestionably good and valid.
3. Moreover, the title falls within the grasp of the statute of prescription of ten years during which owners have been in possession without any adverse claim urged to the property by any one. It can be safely decreed that the purchaser is tendered a title which he must accept.

A PPEAL from the Civil District Court, Parish of Orleans.—
Theard, J

George G. Kronenberger, for Plaintiff, Appellant.

E. J. Murphy, for Defendants, Appellees.

The opinion of the Court was delivered by

BREAUX, J. Plaintiff sued for the return of the sum of five hundred dollars (a payment made on account of the purchase price of a lot of ground and improvements thereon designated as lot 5 of the assessment rolls, in square No. 234, and measuring, more or less, forty feet front on Julia street by one hundred and thirty-nine feet in depth, bounded by Girod, Baronne and Carondelet streets), and for the release from paying two thousand four hundred dollars balance of the purchase which was to be paid on receiving a good and authentic title.

He says that the owner who undertook to sell him the property cannot give him a good title by reason of the fact that Edward Duffy, Sr., who acted as agent in selling him the property, was not duly authorized by the owner, Mrs. Noble, and by reason of the further fact that if he was the owner's attorney in fact, this owner bought the property from the Eureka Homestead Society in the year 1891 during the community existing between her and her husband, John Gilding, and that

the property, in consequence, became property of the community existing between her and her husband.

In the deed of sale to her the following is one of the clauses: "And the said Mary Ann Gilding and John Gilding both declare that the property herein conveyed is purchased by said Mrs. Gilding with her own separate funds."

Mrs. Gilding, widow of John Gilding, was the widow of Edward Cosgrove when she was married to Gilding.

Plaintiff also objects because Emily Glover, one of the ancestors in title, bought the property from John G. Coks per act before Charles Stringer, Notary Public, on the 10th of February, 1874, and in the deed Mary Glover is referred to by the notary as Mrs. Mary Glover; she signed the deed Mary Glover.

In 1884 Mary Glover appointed Charles LeSassier her agent to sell the property, and a short time thereafter LeSassier, agent, sold the property to Emile Bellocq and Michael Beatty. She is not referred to in the procuration or deed of sale as being a married woman.

In 1886 it became, by purchase, the property of the Eureka Homestead Society, and was afterwards sold to Mrs. Gilding as heretofore mentioned.

Plaintiff finds ground of complaint in the fact, as he asserts, that in the Glover to LeSassier procuration, which was signed in Kentucky, the Notary does not give the full name of the vendor, and says that the vendor, "Mrs. Emily Glover, was not authorized by her husband."

Four years after Emily Glover had sold the property, as heretofore mentioned, she made her testament by authentic act, and in it declared that her name was Emily Glover, widow of John Glover. She referred to a son, deceased, named William Horace Glover. In a deed of mortgage, of record, executed in 1874, the name is written Miss Emily Glover; also in the petition of foreclosure of this mortgage in 1879.

Returning to the title while in the name of Mrs. Gilding, it appears that she departed this life in 1891, leaving a will in favor of Mary Ellen, wife of John Noble. A short time after her death an inventory was taken of the property in her name and Mrs. Mary Noble (wife of John Noble), issue of the first marriage of the late Mrs. Gilding with Cosgrove, was put into possession as universal legatee.

In addition to the declaration in the deed, when she became the owner, as before stated, that the property belonged to Mrs. Gilding personally and not to the community, the record shows that the suc-

cession of Mrs. Gilding was opened and settled and final judgment rendered, showing that the property was her paraphernal property. The evidence further discloses in this connection that Edward Duffy and Georgiana Derham swore that Mrs. Mary Cosgrove, widow of John Noble, was the only issue of Mary Ann Gilding, and, furthermore, this is sustained by the last will of the late Mrs. Gilding. John Noble, husband of Mary Noble, died in Ireland in 1899.

The judge of the District Court sustained the title and rendered judgment for the defendant. Plaintiff prosecutes this appeal.

A power of attorney, in due form, and duly authenticated, was executed by Mary Cosgrove, in Ireland, in July, 1900, to Edward Duffy, Sr., of New Orleans, empowering him to sell the property heretofore described, and it binds the vendor, the sole owner of the property at the time.

Plaintiff seems to apprehend that Mary Ann Gilding left other heirs besides Mary Noble. The record abundantly shows, as we think, that this apprehension has no foundation in fact. The declaration in her will is emphatic and direct. "I have only one child living, and she is the issue of my first marriage. Her name is Mary Ellen, wife of John Noble." This is sustained by other evidence in the record. There is not the least reason for concluding that this fact is not just as shown by the testimony.

In the second place, as another ground of objection, plaintiff's contention is that the property was the property of the community between the late Mrs. Gilding and John Gilding. We have seen that Mrs. Gilding bought the property in question in 1891 for her account exclusively with her paraphernal funds, and John Gilding, her husband, joined in the act. The husband joined his wife by signing the act, and, having acquiesced for years in the declaration, is bound by the deed as written. Only forced heirs and creditors would, perhaps, have had cause to complain, but the evidence shows that Gilding died leaving no forced heirs nor creditors.

We pass to plaintiff's contention growing out of the fact that Emily Glover's name is mentioned in the act of sale as Mrs. Emily Glover; that, therefore, the presumption arises that she was married at the date of sale, and in view of this fact she could only dispose of one-half of the property. The name of this vendor is twice preceded in two acts by "Mrs." In other acts and papers about the same time this

abbreviation is not inserted. She may have been wife or widow, or never married. No one appears ever to have known or heard of the husband, and the fact that his name was not mentioned in the deeds of date subsequent to the act of purchase, and other facts and circumstances, lead to the unavoidable inference that she was not married at the date of her purchase of the property and at the date of its sale.

Good faith is one of the issues and the effect of many years of uninterrupted peaceable possession. In our view, those who in turn, as owners, have had possession of the property were in good faith. They had every reason to think that they owned under a good title. If the one who owned the property from 1874 to 1884 was married, the husband (of Mrs. Glover), because of the good faith of the subsequent owners, has lost all right by his continuous absence and negligence. Defendants and their ancestors in title did not have the least reason to suspect that there was a better outstanding title than their own, for there was, as we take it, no outstanding title.

The weight of the testimony clearly shows that this owner was not married. To hold otherwise would be attaching too much importance to the prefix in question, sometimes used by even notaries without good reason, and we would have to overlook other testimony showing that this defendant was never known to have been married. Between the mythical husband and the good faith and title of defendant, we do not hesitate in sustaining the latter.

For reasons assigned, it is ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 14,100.

STATE OF LOUISIANA VS. MOSES AND TAYLOR WASHINGTON.

SYLLABUS.

1. The return of a jury in a criminal case should, with some reasonable certainty, identify the act charged to have been committed by the defendant with the statute under which he is found guilty. A verdict must accord with the terms of a violated statute. 10 A. 191; 35 A. 729; 36 A. 857; 40 A. 200. Courts should not go beyond words of the verdict. 50 A. 595; 84 A. 529; 88 A. 479. The essential facts must be found by the special or what is termed by commentators, a partial verdict. 48th Ann. 1071. In the decision upon which, not without ground, the defendants place reli-

107	298
111	158
107	298
120	118

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ance, it is said: "The special or partial verdict must contain the elements of the crime." State vs. Vance, 49th Ann. 1011. Held, that the verdict, whether considered as a verdict known as partial or special, does not contain the elements of the crime.

2. The charge was shooting with intent to kill or murder. The trial judge properly refused to instruct the jury that the accused could be found guilty of assault, or of assault and battery. State vs. Robertson, 48th Ann. 100.
3. The maxim *factus in uno, falsus in omnibus* is properly, in its application, left to the jury. Witnesses, Rapalje, p. 319, State vs. Banks, 40th Ann. 739.
4. One indicted for having been present, aiding and abetting may, under special statute, be found guilty as principal. State vs. Littell, 45 Ann. 655.
5. A new trial granted on defendants' motion reopens the whole case, and has the effect of disposing of the plea of *autrefois acquit*.

A PPEAL from the Twenty-Seventh Judicial District, Parish of Assumption.—*Leche, J.*

Walter Guion, Attorney General, and *G. A. Gondran*, District Attorney (*Lewis Guion* and *John Marks*, of Counsel) for Plaintiff, Appellee.

Beattie & Beattie, for Defendants, Appellants.

 The opinion of the court was delivered by

BREAUX, J. The accused appeal from the verdict of a jury and the sentence and judgment of the court condemning them to be imprisoned at hard labor for the term of eighteen months.

The information charged Taylor Washington with having shot one Luca Briole with intent to kill and murder, and Moses Washington with having aided and abetted Taylor Washington in committing the crime charged.

They were put on their trial. After having heard the evidence, and after having deliberated, the jury came into court and offered to return a verdict of "guilty with intent to kill." This verdict was handed to the judge, who, after having read it, returned it to the jury, saying to them at the time that it was not a legal verdict, because it was not responsive to the charge. He ordered the jury to return to their room of deliberation in order to find a verdict.

Counsel for defendant reserved a bill of exceptions to the court's ruling, on the ground that the return was a legal verdict. When the

jury came back, after having deliberated as directed by the court, they brought a verdict of guilty.

Upon defendants' motion, this verdict was set aside by the court and the case ordered for new trial on the 1st of August, 1901. On that day defendants filed their pleas of former jeopardy and *autrefois acquit*. The following evidence was submitted on the trial of this plea: First, a copy of the verdict of the jury, brought into court on the 22nd of July, which the court would not accept, and which reads "guilty with intent to kill"; second, the verdict which was accepted by the court, which had been returned by the jury after the judge had refused to accept the first return; third, defendants' motion for a new trial, filed July 25th, 1901, and the copy of the court's ruling thereon ordering a new trial.

The court overruled the plea of former jeopardy and *autrefois acquit*, and assigned for reason that defendants had waived the pleas of former jeopardy and *autrefois acquit* by moving for a new trial, which had been granted. After the plea of former jeopardy had been overruled, the case was called, and the defendants, a second time, were put on their trial. They were found "guilty of shooting with a dangerous weapon with intent to kill." This verdict was accepted by the court and the parties were sentenced to serve as before mentioned.

Moses Washington moved the court in arrest of judgment on the ground that no valid verdict had been found against him and that the verdict as found, being special, does not find him guilty of any act charged in the indictment.

In the first place, able counsel for the defendants urge that the first verdict returned into court, which read as follows, "guilty with intent to kill," was legal and that it should have been accepted by the court; that this verdict not having been accepted by the court, the proceedings held afterwards were of no legal effect, and that the accused was entitled to his plea of former jeopardy and to his discharge.

We have given the question to which the first return of the jury has given rise our most careful consideration, and have not found it possible to arrive at the conclusion that it was a legal verdict. The statute under which the information was drafted is the statute No. 43 of the Acts of 1890. But we take it the jury found the accused guilty of a crime denounced in Statute 44 of the same year, a crime less in magnitude than that denounced in Statute 43. The verdict which the jury had returned, "guilty with intent to kill," and which

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the defendants claim as legal was vague and uncertain. The statute under which we assume this verdict was found reads: "Whoever shall shoot, stab, cut, strike, or thrust any person with a dangerous weapon, with intent to kill," etc. We have just seen that the information was drawn under another and different statute than that just referred to and that under which the verdict was found. It is obvious that the accused could only have been held under the verdict to the extent that they were found guilty of a crime with some degree of certainty under the statute from which we have quoted. A close examination of this verdict discloses that it totally failed to find the defendant guilty of any crime. "Guilty with intent to kill," when considered with reference to the statute, may mean that the jury intended to find the accused guilty with intent to kill without reference to any particular act or attempt on their part. Of course, the jury intended no such absurdity; none the less, no particular act informed against in the bill of information is lacking as relates to averment.

Conceding, however, that they had this statute in view when they framed the verdict, and that it should be interpreted with reference to that statute, what is the result? "Guilty with intent to kill." Guilty of what, with intent to kill? If an attempt be made to construe the return with reference to the statute, it may mean shooting with intent to kill, or thrusting with a dangerous weapon with intent to kill. In fine, it may be construed as guilty of any act with intent to kill, whether in Statute 44 of 1890, or any other. The verdict convicted the accused of no offense known to the law as charged in the information. For the reasons hereafter stated, we have been slow to arrive at this conclusion and even now we take occasion to say that if able and energetic counsel will only point out by reference to the return of the jury, "Guilty with intent to kill," as made, how is it possible to construe this verdict with any degree of certainty as to the crime committed, we will not hesitate in setting aside our ruling on the point.

In reviewing the authorities, we begin with one of the early decisions in which this court held, through Justice Spofford, as the organ of the court, that a verdict for a statutory offense not charged in the indictment must accord with the terms of the statute under which it (the verdict) is returned. *State vs. Pratt*, 10 Ann. 191.

In another decision the court insisted that there should be some conformity with the statute under which a verdict is returned. *State vs. Murdock*, 35th Ann. 729.

The court inveighed against a verdict in language which may be said to have been censorious because of the uncertainty of the return. State vs. Foster and Davis, 36 Ann. 857.

The court said that the jury had failed properly to return that a particular crime had been committed and reversed the verdict. State vs. Allen, 40 Ann. 200.

The late Mr. Justice Miller, for whose judgment we entertain the greatest respect, as the organ of this court was equally as pronounced. "We are forbidden, in construing the verdict, *to go beyond the words* used by the jury, giving to the words their natural significance;" that is, "we cannot read the verdict as guilty of striking with a dangerous weapon, when the verdict is simply guilty of striking," citing a number of decisions and the opinion of an eminent commentator upon the subject. State vs. Ballard, 50 A. 595. (Italics ours.)

The defendants seek, in the first place, to sustain their position by citing a decision in which the court held that the information followed the words of the statute. A more thorough compliance with a statute is not possible than was done in this cited case by defendants. State vs. Cognovitch, 34th Ann. 529.

Appreciating the strength of the defense, and moved by the zeal and earnestness of diligent counsel, we have carefully reviewed each of the decisions cited upon the point, and this brings us to a decision cited by defendant's counsel, holding that "guilty of shooting with intent to murder" is a valid finding, as it *found the accused guilty* as charged under the first count. State vs. Smith. 38th Ann. 479. This return, it will be noted, identified sufficiently the charge with the statute which made shooting with intent to murder a crime.

In another decision cited on the part of the defendant it was said: "If the indictment be for a statutory crime, the essential fact will have to be found necessarily present" in the verdict. State vs. Robertson, 48th Ann. 1071.

We are brought to the last case cited, the Vance case, in the 49th Annual, in which the return of the jury was similar to the return in the case before us for decision. The decision is invoked with confidence by the defendants, but even in this decision we find the following: "The verdict, when special, must, of course, contain the elements of an offense" (Bishop's Crim. Law, 1006) "and that is also our view." With reference to this last cited case, we can only repeat that which was said in substance in the Linigan case, 46th Ann., 1125.

The authority of the Vance case on the particular point involved must yield. It cannot stand the test close study and experience will require.

A verdict for the State has no more weight as a precedent than the verdict for the accused. Each is weighed and considered in the same light, and the mere fact that in the Vance case the ruling was made on an appeal on behalf of the State gives it no special weight, if it does not identify the offense, or contain all needful elements of the crime.

We will not discuss the question as to whether the court has the right to require an incomplete verdict perfected. If the verdict was not legal, there was only one alternative; that was to direct the jury to return to their chamber of deliberation and find and return a legal verdict. The first bill of exceptions taken to the judge's charge brings up the following questions.

During the course of the trial, while the judge was delivering his charge to the jury, he was requested to instruct the jury that, under the charge of shooting with a dangerous weapon with intent to kill and murder, the jury was authorized to find the accused guilty of assault and battery, or guilty of assault. The judge refused thus to instruct the jury. The defendants reserved a bill of exceptions. This refusal is sustained by a recent decision on the ground, briefly stated, that "the verdict would enter into regions of uncertainty" as to whether the accused was guilty of the specific crime charged, "or any of the specific minor offenses." Support for this position was found in 35th Ann. 729 and 10 Ann. 191. It follows that this ground cannot be sustained. The defendants' case finds no support in the decision just cited. State vs. Robertson, 48 Ann. 1071.

In one of the defendants' bills of exceptions, the defense asked the court to charge that a witness who swears falsely as to a material fact in the trial of the case is unworthy of belief, a rule expressed by the maxim *falsus in uno, falsus in omnibus*. The court refused the charge, and held that they (the jury) are the sole judges of the weight of the evidence and credibility of witnesses.

The facts are, as we are informed by the narrative of the bill of exceptions, that the witness, whose name is given, had sworn differently on the first trial from his testimony on the second trial, as shown by the testimony of the interpreter, and the purpose was to impeach the testimony of the witness. Generally a witness who is false is not to be believed, but, none the less, the question is in great part left to the jury, who are not to be held bound to disbelieve the witness, however

wilfully he may be false, for he may be corroborated in other portions of his testimony; and, after all, the question as to whether he is credible is a matter for the jury to determine, "who may, if they choose, yield entire credit to some of his statements and disbelieve others, crediting such part as they may deem auxiliary to the ascertainment of the truth." Law of Witnesses, Rapalje, p. 319. State vs. Banks. 40 Ann. 739.

We pass to the next question before us for decision. It is the ground set forth in the motion to arrest the judgment in which one of the defendants claims his release, as we take it, because, as he contends, he is charged as an accessory, and a special verdict of guilty of shooting with a dangerous weapon acquits him.

The charge brought against him in the information is that he was "aiding, present, abetting, and assisting" the co-accused. The question is: Can he be found guilty as principal? This court had occasion to pass upon a similar issue. The indictment was precisely as in the case in hand. The court, citing 12th Ann. 390, and 10th Ann. 207, and especially referring to Acts of 1855, p. 149, Sec. 11, decided that the defendants are charged as principals, whether present, aiding, and abetting or personally committing the offense. This disposes of all the grounds raised, needful to be decided before framing the decree.

Recurring to the defense presented and conceding, for a moment, that the return of the jury, which we have decided was not a good return, was a valid return, we are then brought to the issue raised by the plea of former jeopardy and *autrefois acquit*. We take up this ground of objection and dispose of it, although it could well be left out.

The defendants, through counsel, on this point urge that, having taken a bill of exceptions to the court's action in refusing to accept the first verdict returned, "guilty with intent to kill," as before stated, a motion for a new trial to set aside the second return made by the jury presenting their verdict, because it was illegal, and accused had once been in jeopardy, did not have the effect for which the State contends.

It will be borne in mind that upon this motion a new trial was granted. Everything connected with the trial was set at large, and again, on their own motion, defendants stood upon their trial and asked to be acquitted of the charge brought. Manifestly, if the first return had been legal, and the court had refused to accept it, the bar to a second prosecution would have been complete. But, in order that

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the plea could have availed the defendant, it would have been necessary to persist in claiming his acquittal. He cannot, by his action, take part in bringing on another trial and then, if found guilty, invoke the plea of *autrefois acquit* grounded upon a return in a prior trial. The defendant must produce a record of acquittal. This he is unable to do, owing to the new trial granted on his motion. The provisions of the "Constitution of the United States and laws protecting a person from a second prosecution for the same offense will be enforced. But he must show a record." *Bailey vs. The State*, 26 Georgia, p. 280.

True, the defendants objected seasonably. But the new trial carried with it results by which they are bound. Had they been acquitted on the second trial, that would have been an end of the case. They have been found guilty; they cannot be heard to return to the condition existing prior to the trial.

"And when a person has been placed in actual jeopardy, the jeopardy cannot be repeated *without his consent*, whatever statute may exist on the subject." 1 Bish. Crim. Law, 1206, 5th Ed. This brings our review of the proceedings to an end. We have reviewed every point and we find no ground upon which the accused can be held acquitted or upon which to grant another trial.

For the reasons assigned, the judgment of the District Court is affirmed.

PROVOSTY, J., dissenting, handed down a separate opinion.

Rehearing refused.

107	305
1117	735

No. 13,838.

WILLIAM H. HOWCOTT VS. CITY OF NEW ORLEANS.

SYLLABUS.

1. Where a title to real estate is vested in two persons, who hold in indivision, and in equal proportions, the whole property may be assessed to both owners without specification as to their respective interests, though it is otherwise when each owns a designated portion of the property or they own unequal proportions; and, in the former case, if the assessment is regular as to one of the co-owners, he can have no reason to complain that it is defective as to the other, since such defect can work him no prejudice.

2. The doctrine that proceedings conducted against and in the name of one who is dead, and which lead to the sale of property for taxes, convey no title, is inapplicable where the holder of the recorded title is living. In such case, neither the assessor nor the collector is bound to go beyond the recorded title in search of the owner.

A PPEAL from the Civil District Court, Parish of Orleans.—
St. Paul, J.

Kernan & Gowland, for Plaintiff, Appellant.

William Winans Wall, for Grace F. Chamberlain and Heloise Chamberlain, Heirs of Edward Chamberlain, Warrantors, Appellant.

Frank B. Thomas, Assistant City Attorney, and *Samuel L. Gilmore*, City Attorney, for Defendant, Appellee.

The opinion of the court was delivered by

MONROE, J. The petition in this case alleges that the defendant is slandering plaintiff's title to two squares of ground in this city by having registered in the conveyance office pretended tax adjudications thereof, to itself, which adjudications are void, and of no effect, for the reasons:

1. That they are predicated upon assessments in the names of persons who were not the owners of the property.
2. That the advertisements of the sales contained all the vices and defects contained in the assessments.
3. That the notices of the intended sales, required by law, were not given.
4. That the city has admitted, and is estopped to deny, the nullity of said adjudications, by assessing and collecting the taxes for subsequent years.

We find the following in the record, to-wit:

"It is admitted that the plaintiff, W. H. Howcott, acquired by purchase the interest of Grace F. Chamberlain *et als.*, who are the heirs of the late Charles M. and Edward Chamberlain, in the property in controversy herein, as alleged in the petition, and is in possession thereof; that Grace F. Chamberlain *et als.* were the heirs of the late Charles M. Chamberlain, who died intestate on September 13th, 1862, and Edward Chamberlain, who died in 1894, and that the said Charles

M. and Edward Chamberlain were the owners of said property by inheritance from their father, Nathaniel Chamberlain, who died in 1839, and who acquired said property by purchase from the New Orleans Canal and Banking Company in 1833; that said property was adjudicated by the City of New Orleans for taxes alleged to be due for the years 1880 to 1889, both inclusive, under assessments and advertisements made in the name of C. and E. Chamberlain, the said adjudications having been made on May 7th, 1894, and duly registered in the conveyance office.

"This admission is made without in any manner admitting the validity of said adjudications.

"That the city bases her adjudication and sale on a notice served on one J. C. Vidou, on April 7th, 1893; that taxes have been paid by the present plaintiffs, as per tax receipts annexed and made part hereof; that the property in controversy herein was adjudicated by the State Tax Collector for alleged State taxes for years prior to 1879, under the act of the Legislature No. 82 of 1884, to J. C. Vidou, under assessments made to C. and E. Chamberlain; that J. C. Vidou, on May 27th, 1893, sold to John Baltz; that neither Vidou nor Baltz ever paid the State and city taxes due subsequent to 1879, which were assumed in their deed from the tax collector; that subsequent to the city's adjudication to herself, on May 7th, 1894, the title of the said John Baltz and J. C. Vidou was, on the suit of Grace F. Chamberlain *et als.*, annulled and cancelled by judgment of the Civil District Court.

(Signed) "KERNAN & GOWLAND,
"Attorneys for Plaintiff.

"(Signed) FRANK B. THOMAS,
"Assistant City Attorney."

"INSTRUCTIONS TO THE CLERK AS TO THE TRANSCRIPT.

"The clerk will copy in the transcript the following documents and no others, to-wit: (1) The petition; (2) the answer; (3) the judgment rendered January 8rd, 1901; (4) the agreement of counsel, filed January 15, 1901, and marked 'X. Y. Z.'; (5) motions and bonds of appeal.

"(Signed) KERNAN. & GOWLAND,
"Attorneys."

There are no pleadings or documents and no evidence in this record other than as thus specified in the instructions given by the plaintiff's attorneys to the clerk, and the certificate of the clerk reads: "That the foregoing nine pages do contain a true, correct, and complete transcript of all that portion of the proceedings had, documents filed, and evidence adduced, upon the trial of the cause * * * and now in the record thereof * * * required to be included therein, as per type-written instructions of Messrs. Kernan & Gowland, attorneys for plaintiffs and appellants, copied in said transcript on page 9."

In the District Court, there was judgment for the plaintiff, "setting aside the tax adjudications and tax sales, in the name of J. C. Vidou, Jr., to the City of New Orleans, evidenced by two acts of sale, both executed before J. D. Taylor, notary, on May 14th, 1894, and registered in the conveyance office in this city in book 151, folios 440 and 441, respectively, but in so far only as the same affects the one undivided half interest formerly belonging to Charles M. Chamberlain in the following described properties" (giving the description); "that in all other respects plaintiff's demand be rejected, and that the defendant pay all the costs of the suit." From this judgment, plaintiff, as also Grace F. and Heloise Chamberlain, alleging an interest as warrantors, have appealed.

It may fairly be inferred, from the admission of the counsel, that the property in question was inherited by Charles M. and Edward Chamberlain, in indivision, and in equal proportions, and that, from the date of such inheritance, in 1839, it was assessed to C. and E. Chamberlain. The omission of the initial "M" can hardly be considered material, under the circumstances, and the assessment, as thus made, was undoubtedly valid up to the date of the death of Chas. M. Chamberlain, in 1862, since the whole property was to be assessed, each of the two heirs owned exactly the same interest as the other, and the assessment in the two names sufficiently indicated that fact. If their inheritance and ownership had been several, or had been in unequal proportions, instead of by "moities;" that is to say, if each of them had owned designated portions of the property, the assessment of the whole, together, would have been bad, for the reason that, in such case, the property of the one would have been distinct from, and might have been more, or less, valuable than that of the other. But, inheriting and owning as they did, each an undivided half interest in the whole, the assessment of the whole to both could have operated to

the prejudice of neither. And, for the same reason, so long as the property continued to be assessed to the owner, in indivision, of an interest equal to an undivided one-half, and to not less than one other person, and so long as the assessments, advertisements and notices were regular as to such owner, it could have been a matter of no concern to him whether, as to the remaining interest, they were good or bad, since, he could not have been made liable for more than his share of the taxes. It is admitted that the property was sold by the State, under Act 82 of 1884, for taxes, due prior to 1880, and we must presume that notice of the pretended sale was given to those who, within the meaning of Article 210 of the Constitution of 1879, were to be considered the owners. If there was a failure in this respect as to the interest which had been owned by C. M. Chamberlain, it did not effect the sufficiency of the notice, presumably, given to E. Chamberlain, and we are of opinion that those claiming under the latter can not avail themselves of such failure any more than of the alleged defect in the assessment of the interest which had belonged to C. M. Chamberlain.

Whilst the property stood, by recorded title, in the name of the party to whom it was adjudicated by the State, the city, proceeding contradictorily with such apparent owner, adjudicated it to herself. It is now claimed that the apparent title of the adjudicatee from the State was subsequently annulled in an action brought by the present plaintiffs, and that it must, therefore, now, be held that such adjudicatee had no capacity to receive the notice, and, to that extent, represent the owner for the purposes of the proceedings taken by the city, but that it was the duty of the city to go behind the recorded title and to deal with the property as though the title were still vested in the Chamberlains, and, in support of this view, we are referred to the opinion of this court in the case of *Geddes vs. Cunningham*, 104 La. 306. That opinion was not, however, intended to bear, nor do we think it properly susceptible of, the interpretation which is thus placed upon it. The court was then dealing with a case in which the registered owner had been dead for nearly six years, and her succession had been opened in the parish where the property in question was proceeded against, and where it was sold, for taxes, after notices purporting to have been served on the deceased, personally, and through a minor son, who survived her, and the language of the opinion was applied to those facts, but the court did not intend to announce that,

where the holder of the recorded title is living, it is the duty of the tax collector to pass upon the validity of his title and to go behind it in search of any other owner. The distinction between the two classes of cases is recognized in the opinion in the case of *Millaudon et als. vs. Gallagher*, 104 La. 715, in which, after citing a number of cases in which it has been held that proceedings culminating in the sale of property and conducted in the name of a dead man convey no title, it was said: "In the cases to which we are referred by the counsel for the defendant, as supporting a "different view" (citing them) "there were living persons, or existing entities, to represent the names in which the property was assessed, and, those names appearing on the books of the conveyance office, it was held that it was no part of the duty, as it was not within the power, of the assessor and collector to determine, as between such apparent owners and other claimants, in whom the legal title was vested."

In the admission of counsel upon which the instant case had been submitted, it is said: "That taxes had been paid by the present plaintiff, as per tax receipts, annexed and made part hereof;" but the counsel for plaintiff, in giving directions to the clerk as to what was to be included in the transcript, failed to mention any tax receipts. and we have, therefore, no information, as to taxes paid by the plaintiff, other than is contained in the admission above quoted. Beyond this, we rather infer from the record that no taxes have been paid upon the property in question for many years, save the, probably, trifling, amount which was realized by the State from the adjudication to Vidou. That individual, who purchased sometime between 1884 and 1893, assumed, but did not pay, the taxes for 1880 and subsequent years, and, in 1893, as soon as he received notice of the intention of the city to sell for its taxes, sold the property to Baltz, and, thereafter, Baltz appears to have allowed the heirs of Chamberlain to obtain judgment annulling the title by him and to recover the property, but it does not appear that either the State or the city were parties to the suit in which that judgment was rendered or that any one has paid the taxes due to either.

Judgment affirmed.

No. 13,839.

HENRY ASH VS. THE SOUTHERN CHEMICAL AND FERTILIZING COMPANY,
LIMITED.

SYLLABUS.

1. The sheriff has a standing in court in a proceeding against an adjudicatee to set aside an adjudication because of non-payment of the amount of the bid.
2. Such proceeding may be by rule.
3. Where, by the certificate of mortgages read at the sale, there appears to be outstanding special mortgages resting on the property sold, the adjudicatee, after paying to the sheriff the amount of the writ and costs, may retain in his hands, to satisfy said outstanding mortgages, the surplus of the purchase price.
4. The nullity resulting from the sheriff's failure to announce that the adjudicatee shall have the right to retain in his hands the surplus of the purchase price, as stated in number 3, is relative, and the sheriff is without interest and without standing to invoke the same.
5. And, even if the sheriff had such standing, he could not be permitted to urge such nullity in the present proceeding, which is based on the theory of there having been a valid sale of which the adjudicatee has failed to pay the price.

A PPEAL from the Civil District Court, Parish of Orleans.—
Sommerville, J.

Dinkelspiel & Hart, and Buck, Walshe & Buck, for Metropolitan Bank and Germania Savings Bank, Plaintiffs in Rule, Appellees.

Kernan & Gowland, for Plaintiff and J. Q. Gowland, Adjudicatee, Defendants in Rule, and Appellants.

The opinion of the court was delivered by PROVOSTY, J.

On Application for Rehearing by PROVOSTY, J.

PROVOSTY, J. Under a writ of seizure and sale issued in this case, to satisfy one of a series of one hundred and fifty bonds of one thousand dollars and interest, each, a piece of real estate in the City of New Orleans, specially mortgaged to secure the payment of said bonds, was adjudicated to Joseph Q. Gowland, for cash. Gowland offered to pay the amount of the writ and costs, claiming the right to

retain in his hands the remainder of the purchase price, because of the aforesaid special mortgage securing the said other 149 bonds; which mortgage appeared by the certificate of mortgages read at the sale to be outstanding against the property. The sheriff insisted upon the payment of the price of the adjudication; and, together with the two other plaintiffs, the Metropolitan Bank and the Germania Savings Bank, the two banks alleging themselves to be creditors, holders of some of the said 149 outstanding bonds, has instituted the present proceeding by rule to set aside the said adjudication.

The only ground alleged for setting aside the adjudication is the failure of the said purchaser to pay the price. Gowland, the purchaser, excepted, that the motion for the rule shows no cause of action; and that the proceeding should have been by ordinary suit and could not be by rule. Further, and with reserve of said exceptions, he pleaded the general denial.

There is in the record no proof of the allegation that the banks, plaintiffs in rule, are holders of bonds, as alleged, or are creditors at all; hence the case on this appeal must be considered as if the sheriff were sole plaintiff.

The proceeding to set aside an adjudication is a mere incident to the suit, and may, therefore, be by rule.

The sheriff has a standing to set aside the adjudication on the ground alleged, namely, the refusal of the adjudicatee to comply with his bid. Where the adjudicatee fails to comply with his bid, the sheriff may disregard the adjudication, and proceed to another crying of the property. *Lehman vs. Ranson*, 27 Ann. 279. All the more has he a standing to have the court pass on the question, whether the adjudication should be set aside or not.

But the property sold being burdened with a special mortgage concurrent with that to satisfy which the sale was made, the purchaser was well founded in his claim of the right to retain the remainder of the price after satisfying the writ and the costs. In the case of *Johnson vs. Duncan*, 24 Ann. 381, this court said:

"The defendant was bound to retain in his hands, for the benefit of the plaintiffs note, the *pro rata* of the price coming thereto by law, and to pay the same with interest when demanded."

In the case of *Morris vs. Cain's Executor*, 34 Ann. 663, this court said:

"It is another well settled principle that a purchaser at a judicial sale made to satisfy a writ is not bound to pay to the sheriff, whatever the price of the adjudication may be, an amount exceeding that called for by the writ; that if he assume to do so, creditors entitled to a mortgage or privilege, cannot be thereby deprived of their security; that he constitutes the sheriff individually his agent, and would have no recourse against his surety in case of a diversion of funds."

Because the sheriff did not announce that the purchaser should have the right to retain the price is no reason why the right should not exist. The right is given by the Code in all cases where there are special mortgages. True the sheriff is required to make the announcement in question, and this under pain of the nullity of the sale; but the nullity is relative only, not absolute (2 Ann. 617, 861; 9 Ann. 214, 218; Southern Mutual Ins. Co. vs. Pike, 33 Ann. 823); and surely the sheriff is not the proper party to invoke it. Besides the present proceeding is grounded on the failure of Gowland to pay the price, not on the nullity of the sale. The theory of the proceeding is in affirmation of the sale, whereas this contention of the sale having been null, is in denial of a sale.

The contention is inconsistent with the theory of the proceeding and savors of afterthought.

The contention that the sale was made for cash, and that therefore the purchaser must pay cash, is met in express terms by Article 706 of the Code of Practice, which reads as follows:

"But when the property sold is subject to privileges or special mortgage in favor of other persons besides the suing creditor, the sheriff shall require from the purchaser, and he shall be compelled to deliver to the creditor, *whether the sale be made for ready money or on credit*, only the surplus of price beyond the amount of the privileges or special mortgage, if there be any surplus."

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be annulled and reversed and that the rule herein be dismissed at the cost of the plaintiff in both courts.

ON APPLICATION FOR REHEARING.

PROVOSTY, J. In the original opinion we said:

"There is in the record no proof of the allegation that the banks, plaintiffs in rule, are holders of bonds, as alleged, or are creditors at

all; hence the case on this appeal must be considered as if the sheriff were sole plaintiff."

On application for rehearing, counsel for the Metropolitan and Germania Savings Banks call our attention to the fact that there is in the transcript a supplemental transcript, and that by this supplemental transcript it appears that Mr. Gowland was attorney for plaintiff in a rule taken on the Banks in which rule it is alleged that the Banks are owners of the bonds in question; and counsel contend that this judicial allegation made by Gowland, as attorney, was binding on him individually to the extent of dispensing the Banks from making proof of their ownership of the bonds.

We entirely agree with that view, and frankly confess that this supplemental transcript, consisting of a few sheets loose in the transcript, escaped our attention.

But our decision was not based mainly on the fact that the banks had failed to make this proof of their ownership; we never doubted that the Banks were owners of the bonds, and that if the proof had not been made, the reason was that the fact was one as to which there could be no serious dispute; hence, if the decision of the case had turned on this question of ownership, we should, in all probability, have considered whether the absence of this easily made proof was not mere accident, and whether, in justice, the case should not be remanded for further proof; our decision was based on another ground, on which the co-litigant of the Banks had equal standing with them to litigate.

As to this other ground, we adhere to the views expressed in the original opinion. The pleadings of the plaintiffs allege that there was a sale, and that the defendant failed to pay the price of this sale. Not a word do the pleadings contain in denial of the sale and of its perfect validity. The sole and only question involved under the pleadings is as to whether, where a sale has been made for cash, the purchaser may retain part of the price to satisfy mortgages. We thought the Code of Practice answered that question and after reconsideration of the matter we feel constrained to adopt again the same conclusion.

Rehearing refused.

No. 13,762.

H. & C. NEWMAN VS. W. O. & C. R. ELDRIDGE.

107 816
110 701

SYLLABUS.

1. The prescription to be applied, in any given case, is that established by the law of the forum, and the prescription ordinarily applicable to judgments in this State is ten years, under C. C. 3544. An exception to this rule is established by R. S. 2808, which provides that, where a judgment has been rendered in another State, between parties there residing, and has become barred by the law of such State, and the judgment debtor has thereafter come to Louisiana, the prescription established by the law of the State *a quo* will be applied to such judgment in this State. But, where the judgment debtor comes to this State before the judgment against him is prescribed by the law of the State in which it was rendered, and is here sued on such judgment, the case is not within the exception, and the only prescription to be applied is that established by Article 3544 of the Civil Code. And where the action on the judgment is begun and citation is served within ten years from the rendition of said judgment, the prescription so established is interrupted.
2. Under the Revised Code of Mississippi of 1880, a writ of attachment commands the sheriff, not only to seize the effects of the defendant, but to ~~summon~~ the defendant, if he can be found; and, where the return shows that the defendant has been summoned, no further evidence to that effect is required to enable the plaintiff, who obtains a personal judgment upon such summon, to maintain an action in this State upon the judgment so obtained.
3. But where the writ commands the sheriff to summon the firm of A & B (which is composed of A and B), and the return shows that A & B have been summoned, such evidence is insufficient to justify the conclusion that C, a member of A, B & Co. (a firm which had succeeded the firm of A & B), has also been summoned; and hence, an action against "C" cannot be successfully maintained in the courts of this State upon a judgment against "C," where the record contains no other evidence that "C" was summoned.

ON REHEARING.

1. Where one commercial firm is cited and another condemned, the judgment is null for want of citation; it is null even as against those members of the condemned firm who happen to be members of the cited firm; and this, although both firms owe the debt.
2. A partnership is a legal entity entirely separate from its members; and two firms are separate legal entities, though one has grown out of the other by the admission of a new member.

A PPEAL from the Sixteenth Judicial District, Parish of Tangipahoa.—*Reid, J.*

Benjamin M. Miller, for Plaintiffs, Appellants.

Stephen D. Ellis and Robert S. Ellis, for W. O. Eldridge, Defendant, Appellant.

The opinion of the court was delivered by **MONROE, J.**

On Rehearing by **PROVOSTY, J.**

The opinion of the court was delivered by

MONROE, J. This suit was filed in the District Court, March 11, 1897, and there was personal citation upon the two defendants upon the same day. The purpose, as stated in the petition, is to interrupt prescription upon, and to revive and make executory, as against the defendants, a judgment rendered by the Circuit Court of Copiah County, Miss., March 13th, 1890, in favor of the plaintiffs and against Eldridge & Morris and Eldridge, Morris & Co., and W. O. Eldridge, C. R. Eldridge and Isaac Morris. The defendants plead the prescription of seven years, and a general denial. The case was submitted upon a certified copy of the proceedings leading up to the judgment sued on, and the Mississippi Code, of 1880, and there was judgment for plaintiffs as against W. O. Eldridge, but rejecting the demand as against C. R. Eldridge, and both of the parties cast have appealed.

It appears that the firm of Eldridge & Morris, composed of W. O. Eldridge and Isaac Morris, became indebted to the plaintiffs and gave a note and a deed of trust in acknowledgment of, and to secure, said indebtedness. In January, 1890, J. S. Sexton, as attorney for plaintiffs, began an action for the recovery of the debt in question, by filing an affidavit, for a writ of attachment, in which he swears that, "Eldridge & Morris" are justly and truly indebted, etc. And, upon this affidavit, the writ issued, directing the sheriff to attach the said "Eldridge & Morris," by their estate, real and personal, etc., etc., so as to compel the said "Eldridge & Morris" to appear before the Circuit Court, etc.; and to "*summon the said Eldridge & Morris * * ** to appear and answer accordingly." Thereafter, within thirty days, the plaintiffs in said proceeding filed their declaration, in which they alleged that, after the debt sued on had been contracted by the firm of Eldridge & Morris, composed of said W. O. Eldridge and Isaac Morris, C. R. Eldridge was admitted as a partner in said concern, and, in consideration of the interest acquired by him, agreed to be bound by the debts then due, as well as those which might be subsequently

contracted, and that the firm then became, and was known as, Eldridge, Morris & Co., and they prayed judgment accordingly. The sheriff's return upon the writ of attachment was made a few days after the filing of this declaration and shows that he had executed the writ by seizing a lot of merchandise and other personal property, as also the real estate covered by the deed of trust; and that, by virtue of an agreement between the defendants and all of the attaching creditors the merchandise seized, together with certain other property, had been sold. He also recites that he had executed the writ "*by summoning Eldridge & Morris,*" as directed.

Upon the 13th of March, following, the defendants having entered no appearance, judgment was rendered against Eldridge, Morris & Co. as prayed for, and the sheriff was directed to pay over to the plaintiffs the amount realized from the sale of the merchandise, after deducting the costs; and, thereafter, under a writ of *feri facias*, against Eldridge, Morris & Co., the real estate affected by the deed of trust was sold to satisfy said judgment, and the proceeds were placed to the credit thereof, leaving, however, a large sum still due.

The plea of prescription is urged, upon the ground, that, although the suit upon the judgment so obtained was filed, and citation was served in the District Court of Tangipahoa, within seven years, yet no steps were taken in Mississippi, within that time, to revive said judgment, and that, under the laws of that State, it is prescribed, and hence, that no action will lie on it here.

It is well settled that the rules of prescription to be applied in any given case are those established by the law of the forum (C. P. Art. 13; *Lacoste vs. Benton*, 3rd Ann. 220; *Bacon vs. Dahlgren*, 7 Ann. 605); and the prescription ordinarily applicable to judgments in this State is ten years, under C. C. 3544. An exception to this rule is, however, made, by our law, where a judgment has been rendered between persons residing out of the State, and, the same having become barred by the law of the State in which it was rendered and was to be executed, the debtor *subsequently* comes into Louisiana. But, the instant case does not fall within that exception, and the prescription of seven years, established by the law of Mississippi, is, therefore, inapplicable.

R. S. 2808, *Walworth vs. Routh*, 14 Ann. 205.

It is contended that the judgment sued on has only the effect of a judgment *in rem*, for the reason that it does not appear that the

defendants were cited. The law of Mississippi, in force when the proceeding was conducted (Rev. Code of 1880), provided that (Sec. 2418), in attachment suits the writ should issue on affidavit and bond, and should be "*the leading process of the suit,*" that (2419), it should command the sheriff to attach the defendant by his goods, and to "*summon*" the said defendant; and that (2423), the officer receiving the writ, should *summon* the defendant, if he can be found, to appear and answer the action.

Section 1527 regulates the execution of original process, and Section 1528 provides that, "It shall not be necessary in any case, for the officer who executes any process, to state the particulars of the service, but a general return of "executed," with the date and signature of the officer shall be sufficient." The Sections 1522, 1525, 1526, 2284, to which we are referred by the counsel for defendants, contain provisions, applicable to suits in general, which are controlled by the particular provisions referred to in so far as the attachment proceedings are concerned. In the instant case, the writ, as the law required, directed the sheriff to summon the defendants Eldridge & Morris, and the sheriff, as the law required, actually summoned said defendants and made his return to that effect. Eldridge & Morris, as we have seen, was a firm composed of W. O. Eldridge and Isaac Morris, and, as the sheriff's bill shows service on two defendants, it may be supposed that it was they who were summoned and that personal judgment was properly rendered against them. *Feltas vs. Stark*, 12 Ann. 799.

There is nothing, however, to show that C. R. Eldridge, who was not a member of the firm of Eldridge & Morris, was ever summoned, and we are of opinion that the present demand, as against him, was properly rejected. "Without service of citation, or appearance, a judgment is, *per se*, of no effect." *McNairy and others vs. Bell*, 5 R. 418; *Morris vs. Bailey*, 15 Ann. 2.

The defendants have filed, in this court, a plea of prescription of ten years, but, as the action was begun in the District Court within seven years from the rendition of the judgment sued on, the prescription was effectively interrupted.

Inasmuch as the plaintiffs and the defendant, W. O. Eldridge, have alike, appealed, and neither of them takes anything by such appeal, the costs should be divided. It is, therefore, ordered, adjudged and

Newman vs. Eldridge.

decreed, that the judgment appealed from be affirmed, and that the costs of appeal be borne in equal proportions by the appellants, respectively.

PROVOSTY, J., takes no part.

ON REHEARING.

PROVOSTY, J. This is a suit to revive and make executory in the State a judgment rendered in the State of Mississippi against Eldridge, Morris & Company, once a commercial firm composed of W. O. Eldridge, Isaac Morris and Charley Eldridge. The judgment is not sought to be revived as against Isaac Morris, and it is now finally decided to have been void as against Charley Morris for want of citation; and the question is whether, for the same cause, it was not void as against W. O. Eldridge also.

He was not personally cited, nor was he cited as a member of the firm of Eldridge, Morris & Co. The only citation issued was against the firm of Eldridge & Morris. How this citation was served, whether by handing to W. O. Eldridge, or to his partner, or by being left at the place of business of the firm, and if served in either of the latter forms, whether W. O. Eldridge ever had any personal knowledge of it, does not appear by the record.

The history of the matter is, as follows: The debt was created by the firm of Eldridge & Morris. Thereafter Charley Eldridge was admitted as a member and the firm became Eldridge, Morris & Co. The suit was begun by affidavit for attachment, the petition being filed afterwards. In the affidavit the debt is stated to be due by Eldridge & Morris; and the prayer is that the property of Eldridge & Morris be seized, and that Eldridge & Morris be cited. The names of the partners are not given, nor is there any prayer for the citation of the partners individually. In the petition the allegations are, as follows: That the debt is due by the firm of Eldridge, Morris & Co., composed of W. O. Eldridge, Isaac Morris and Charley Eldridge; that the debt was created by the firm of Eldridge & Morris, and that Charley Morris was afterwards admitted as a partner, and became bound for the debt *in solido* with his partners; and the prayer is, as follows: "Wherefore plaintiffs sue and demand judgment for said sum, interest and costs." A store with contents and a steam cotton gin and other property was seized, but whether the property belonged

to Eldridge & Morris, or to Eldridge, Morris & Co., the record does not show; although the inference would be that it belonged to Eldridge & Morris and had passed to Eldridge, Morris & Co. on the admission of Charley Eldridge into the firm. The property seized was sold by consent of parties, but who are the defendants who thus consented, whether Eldridge & Morris, or Eldridge, Morris & Co., does not appear. None of the defendants made appearance in the suit, the judgment going by default. In the body of the judgment the defendants are not named, but are designated merely as "the defendants;" their identification being left to be inferred from the heading of the document, which is as follows: "H. & C. Newman vs. Eldridge, Morris & Co."

Thus it appears that one firm, Eldridge & Morris, was cited; and another firm, Eldridge, Morris & Co., was condemned. The judgment therefore was rendered against a firm not cited. It was, in consequence, null and void.

That W. O. Eldridge was a member of both firms, and that both firms owed the debt, makes no difference. The question is not one of indebtedness, *vel non*, but of compliance, *vel non*, with the forms of law for bringing a defendant into court. Had the plaintiffs cited W. O. Eldridge personally the case might be different; or even if it were shown that the process addressed to his firm had been served personally on him (*Montague vs. Weill & Bro.*, 30 Ann. 54); but, *non constat*, that he was ever cited, except fictively, by or through the citation on the firm, or that he ever had personal notice of the suit. The firm was a legal entity, entirely separate and distinct from its members; and the two firms, though one had grown out of the other and had in its composition two members, or ex-members, of the other, were entirely distinct and separate legal entities, or persons. (*Abat & Genereux vs. Penny*, 19 Ann. 290; *Paradise & Bro vs. Gerson*, 32 Ann. 532; *Succession of Pilcher*, 39 Ann. 362.) A member of a firm cited fictively by the citation of his firm is not, so to speak, personally in court, but only fictively, as a member of the cited firm. He is in court only as he has been cited, that is, fictively, as a legal effect of his membership. Such a citation does not bring him personally into court, nor for all purposes, but only as a component part of the firm, and solely and exclusively for the purpose of answering for the acts of the firm. If it is sought to enforce against him any obligations except those flowing as a legal effect of his membership of the cited

firm, he must be personally cited. If it is alleged that A owes a debt *in solido* with the firm of A B C of which he is a member, and the firm alone is cited, not the individual members, and on the trial it develops that the firm does not owe the debt, but that A alone owes it; it will not be possible to render judgment against A, for he will not have been cited. *Non constat* that he will have had actual notice of the suit, or that if he had had, he would not have been able to exonerate himself from the demand.

The separateness of a firm from the members composing it, is a matter of commercial law and of well nigh universal jurisprudence, and we assume that in Mississippi, as in Louisiana, a citation addressed to the firm and returned as having been served, will be considered as having cited the firm alone, and not the individuals composing the firm, except as these members can be made answerable by and through the firm.

Counsel for plaintiff says that: "The attachment affidavit alleges that the firm of Eldridge & Morris is composed of W. O. Eldridge and Isaac Morris." This is a mistake, the names of the partners are not given in the affidavit, nor in the writ, nor in the sheriff's return. In every instance nothing more is given than the name of the firm—Eldridge & Morris. True the firm of Eldridge & Morris is spoken of as "the defendants," but the firm alone being named, and the individuals not being named, this term must be understood as referring to the firm. The presumption, *omnia rite acta*, cannot help the situation, when plainly the court has condemned one firm on a citation issued to another firm.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be set aside in so far as it condemns W. O. Eldridge, and that the suit of the plaintiffs be dismissed at their cost in both courts.

No. 14,022.

JOSEPH WEILL & Co., IN LIQUIDATION, vs. THOMAS D. KENT, ET ALS.

107	322
107	108

SYLLABUS.

1. The purchaser of a growing crop being charged with presumptive knowledge of the existence of the privilege of the furnisher of supplies resting upon it, allegations of his having had actual knowledge of such privilege are unnecessary and surplusage, and the disproof of such allegations does not affect the case one way or another. If the petition in the case contained a cause of action previous to such disproof, it still does so.
2. A debt "for money and necessary supplies to make the crop" is privileged on the crop.

A PPEAL from the 20th Judicial District Court, Parish of Lafourche.—*L. P. Caillouet, Judge.*

Beattie & Beattie, for Plaintiffs, Appellees.

Howell & Martin, for Defendants, Appellants.

The opinion of the Court was delivered by

PROVOSTY, J. When this case was before us the first time, see 59 Ann., 2139, we held that the furnisher of necessary supplies' privilege "on the crops of the year and the proceeds thereof," is not divested by a sale, private or judicial, of the plantation while the crop is growing; but that the crop passes to the purchaser subject to the privilege; and we held that the privilege need not be recorded in order to affect third persons, the crop *quoad* the privilege being a movable, and privileges on movables not needing to be recorded. Furthermore, following the doctrine of the cases of *Welsh vs. Barrow*, 3 Ann. 133, and *Garcia vs. Garcia*, 7 Ann. 526, we held that this privilege can be enforced in a personal action against the purchaser of the plantation and detainer of the crop or its products.

Under the application of these principles, the purchaser is charged with presumptive knowledge of the existence of the privilege, and, since this presumptive knowledge takes the place of actual knowledge, and has the same effect in law, the question of actual knowledge *vel non* becomes entirely immaterial. Hence, the allegations that the defendants in this case had such actual knowledge, and that they induced the plaintiffs not to record their privilege, were unnecessary and

Barr & Hettermann vs. Henderson.

did not affect the case one way or another, and their elimination by disproof has not affected the case one way or the other, and has not made an opening for the contention now urged that the defendants, in the absence of privity of contract between them and the plaintiffs, cannot be held in the present form of proceeding. Whether the defendants can be so held must be considered as settled by the decision on the first hearing, which was that the petition contains a cause of action.

On the other points in the case we will say, generally, that the evidence fully establishes that the crop was sufficient to pay plaintiffs' claim, together with all other claims having concurrent right; and that, since there can be no denial that up to the amount shown by the document marked P—2, in the record, the advances consisted of necessary supplies of money advanced to make the crop, the claim, up to said amount, is privileged on the crop.

It is therefore ordered, adjudged and decreed that the judgment appealed from be affirmed with costs in both courts.

No. 14,169.

BARR & HETTERMANN VS. W. K. HENDERSON.

SYLLABUS.

1. Where A was to get lumber from B and deliver it to C, and both contracts were broken, the one breach the consequence of the other; and in suits predicated on the respective breaches damages were allowed, measured by the difference between market value of the lumber and contract price; A after paying the judgment awarded to C against him cannot come back against B for the amount; it would be making B pay the same damages twice.

A PPEAL from the First Judicial District, Parish of Caddo—
Land, J.

Alexander & Wilkinson and George Whitfield Jack, for Plaintiffs,
Appellants.

Wise & Herndon, for Defendant, Appellee.

The opinion of the court was delivered by

PROVOSTY, J. Plaintiffs contracted with defendant for the output of his saw-mill for one year, and then contracted to deliver the same

lumber, or part thereof, to E. B. Williams & Co. Defendant defaulted on his contract with plaintiffs, and as a consequence plaintiffs defaulted on their contract with Williams & Co. Plaintiffs brought suit and recovered of the defendant the difference between the market value of the lumber and the contract price. Williams & Co., in turn, brought suit and recovered of the plaintiffs the difference between the market value of the lumber and the contract price. Both suits covered the same ground. In both what was claimed was the market value of the lumber, less the contract price. Plaintiffs seek to recover in the present suit the amount paid to Williams & Co. Evidently it is an attempt to make defendant pay twice for the market value of this lumber, less contract price; it is a renewal of the first suit.

For greater clearness we have put the case as if plaintiffs had sold all the lumber to Williams & Co., and at the same price; in point of fact they did not; but the legal situation is not thereby changed; the essential element of the problem is that in both cases the thing claimed was the market value.

If they sold to Williams & Co. only a particular grade, they could, and did, claim from defendant for that particular grade the same market value that Williams & Co. claimed for it of them. That particular grade was to be delivered to them by defendant, just as well as by them to Williams & Co.; and they were equally with Williams & Co. at liberty to claim for it market value, and in point of fact did equally claim for it market value. Again, if we suppose that the prices of the two contracts were different, the result is that the one demand contained the other, plus the margin between the two prices. If plaintiffs sold at a profit, as in point of fact they did, the demand of their suit contained the demand of the Williams & Co. suit, plus this profit. If they sold at a loss, then the situation as between the two suits was reversed. But in the latter event the excess contained by the Williams & Co. suit, cannot be recovered of defendant; as it is the result of plaintiffs having sold at a loss, and not of the breach of defendant's contract. As admirably put by the very learned District Judge, "If the lumber had been delivered by defendant to plaintiffs, and they had delivered same to Williams & Co., plaintiffs would have sustained the same loss."

There is no error in the judgment appealed from, and it is affirmed.

No. 14,276.

107	325
115	154
118	156

STATE OF LOUISIANA VS. ALEX HARRIS.

SYLLABUS.

1. Defendant charged with a transitory crime alleged to have been committed in a particular parish should, before the jury retires to its room for decision, except to a further continuance of the trial before it, if he objects that the evidence taken on the trial disclosed that as a fact the act was committed a few feet beyond the parish line. He cannot take the chances of a verdict in his favor by the jury which would conclude the State with the right reserved to urge the invalidity if the verdict should be adverse. The verdict found in such cases disposes of the question of venue.
2. Exceptions to the charge of a judge should be made at the time the charge is given and a bill of exception be then taken.

A PPEAL from the Eleventh Judicial District, Parish of Natchitoches.—*Porter, J.*

Walter Guion, Attorney General, and *W. A. Wilkinson*, District Attorney (*Lewis Guion, of Counsel*), for Plaintiff, Appellee.

Scarborough & Carver, for Defendant, Appellant.

STATEMENT OF THE CASE.

The opinion of the Court was delivered by

NICHOLLS, C. J. The defendant was prosecuted by indictment charging him on separate counts with forging and uttering a forged instrument.

He was acquitted of the forgery, but the jury convicted him on the second count, to-wit: Uttering a forged instrument.

He applied for a new trial, on the grounds:

1st—That the verdict was contrary to the law and the evidence in finding that the accused was guilty of uttering a forged instrument at all, and in finding that he uttered same in Natchitoches Parish; the offense, if any, was committed in the Parish of Red River.

2nd—Because the court erroneously charged the jury that they might convict for an offense committed in Red River Parish within one hundred yards of the boundary line of Natchitoches Parish.

3rd—Because the court was without jurisdiction to inquire into or determine offenses committed in Red River Parish. The Judge re-

fused to grant the new trial, stating that he refused it "for the reason that the charge of the court to the jury that the jury might find the accused guilty of the crime charged if it were convinced beyond a reasonable doubt that the same was committed within one hundred yards of the boundary line between the parishes of Natchitoches and Red River, in accordance with Section 988 of the Revised Statutes of the State—that, while there was one witness who swore that Orains' house, the place where the forged instrument was uttered, was in Natchitoches Parish, the large preponderance of evidence was to the effect that it was about twenty feet from the bank of Bayou Lumber on the Red River Parish side. The said bayou being the boundary between the parishes of Natchitoches and Red River, and the evidence showed beyond any doubt that the uttering was done in Red River Parish, within one hundred yards of the boundary."

"On the principle that the court ought to sustain the constitutionality of a statute, it is clear, I think, that the motion in that respect is without merit."

Defendant reserved a bill of exceptions to this ruling and annexed thereto his own motion for a new trial and his reasons assigned therefor.

He then moved in arrest of judgment on the ground that the offense, if any, was committed in the Parish of Red River and the court was without jurisdiction to inquire into and determine the same. The court overruled this motion and sentenced the defendant under the verdict, and he appealed.

Defendant urges that Section 988 of the Revised Statutes, providing that crimes committed within one hundred yards of the boundary line between two parishes may be prosecuted in either parish is in conflict with Article 9 of the Constitution of 1898, which provides that "all trials shall take place in the parish in which the offense was committed," and therefore Section 988, R. S., must be considered repealed. In support of this position he refers the court to *R. McDonald*, 19 Mo. Appeals, p. 370, cited in 4 Am. & Eng. Ency. of Law, p. 739 (1st Ed.).

Also to *Dougan vs. State*, 30 Ark. 41; *Buckrice vs. People*, 110 Ill. 29, and *State vs. Lowe*, 21 West Va. 783, cited in 28 Am. & Eng. Ency. of Law, pp. 232 and 234, 1st Ed.

The State insists that this question is not properly presented to the Supreme Court and cannot be considered in the manner in which it

has been raised; that it should have been presented by a *request* to the judge *asking him to charge the jury* that an offense could not be tried in any parish other than that where the crime has been committed, and not on a motion for a *new trial*, citing 33 Ann. 1016; 37 Ann. 40; 38 Ann. 307, and 41 Ann. 323.

It is maintained, further, that by Article 85 of the Constitution the Supreme Court is restricted to the consideration of the questions of law; that the question presented was one of fact, and not law, and resolved itself into a determination, as a matter of fact, by the Supreme Court, whether the crime was committed in Natchitoches Parish or Red River Parish. That the judge *did not have the right to make the statement* he did, in his own *written opinion*, *refusing the new trial*, concerning his *charge* to the jury, with respect to their right to convict the defendant in Natchitoches for an offense which they believed had been committed within one hundred yards of the boundary line of that parish.

Should the court consider the matter properly before it, counsel for the State refers to Minn. vs. Robinson, 14 Minn., p. 447; also Bayliss vs. The People, 46 Mich., 223; The People vs. Davis 45 Barbour (N. Y.), 495; People vs. Davis, 56 N. Y., 95, and Proffatt on Jury Trial, Sec. 106, p. 149.

The first complaint made by the defendant is one which reaches us through a bill of exceptions taken to the refusal of the District Judge to grant him a new trial and to *abate the prosecution*. No objection was urged to the *venire*; none to the grand or petty jury; none to the indictment, nor to any evidence adduced upon the trial, and none to the jurisdiction of the court. After the trial had closed by a verdict against the accused, he urged the court to grant him a new trial upon the ground, first, that the verdict was contrary to the law and the evidence in finding that he was guilty of uttering a forged instrument at all, and next in *finding* that he uttered the same in *Natchitoches Parish*. It is evident that the District Judge was of the opinion that the jury had not erred in finding appellant guilty of uttering a forged instrument, for had this been the case, he would unquestionably have granted a new trial. That feature of the case is, therefore, eliminated from consideration, leaving standing the second point urged that the jury *erred in finding* that the *uttering* of the forged instrument "*was in the Parish of Natchitoches.*"

As matters stand, we have to deal with a case in the 11th Judicial District Court for the two Parishes of Red River and Natchitoches, wherein a grand jury of the Parish of Natchitoches has found an indictment charging defendant with having committed the crime of uttering a forged instrument in that parish, and a petty jury of the same parish has, after hearing evidence, held that charge to be well grounded and founded, in the correctness of which conclusion, as to guilt, the judge of that district concurs.

The guilt itself of the defendant has been established in a manner by which we ourselves are concluded as to the questions of fact involved which go to establish "guilt," if the body which found the verdict was legally authorized to pass upon the question. The crime with which defendant was charged in the indictment was not of a local character; that is to say, it was not one which was made dependent for its very existence upon its having been committed in a particular place, as would be, for instance, the crime of having sold liquor in a particular parish without having first obtained a license from the authorities of that parish. He was charged with having uttered a forged instrument. It was not essential for the existence of that crime that it should have been committed in any particular parish of the State. State vs. Sullivan, 49 Ann. 199-200-201.

If this act was actually committed, it was immaterial for the purposes of "*guilt*" on the part of the defendant whether this was done in the Parish of Natchitoches or in the Parish of Orleans.

The place of commission would simply affect the place where defendant's guilt or innocence would have to be tried, the body which was to charge him with the crime and the tribunal which was to pass upon the fact whether he committed it. If the verdict in this case be set aside, it will not be due to its intrinsic incorrectness, but to the fact that the body charging the crime and the tribunal trying the prisoner were not authorized and empowered to do either the one or the other; in other words, the matter at issue is one of the power or jurisdiction of the grand jury and the power and jurisdiction of the petty jury over the case. The court itself was one of general jurisdiction over all crimes not of a local character. The grand jury was a legally constituted body of that court. If it erred in charging the defendant with committing a crime in the Parish of Natchitoches, it erred as a matter of fact. It had the legal right to charge the crime, leaving

to a petty jury to ascertain from the evidence to be adduced what the facts of the case were.

An indictment having been returned, the charge therein contained was necessarily submitted for investigation as to the facts to a petty jury of the Parish of Natchitoches. Such jury having been empanelled, it entered upon the examination without any protests or exceptions by the defendant that the charge, which, under the indictment, *prima facie* was one examinable by the jury, was one which, under its facts, could not be taken cognizance of by the jury. The jury retired to its room without any request from the defendant to the court to instruct the jury that it was without authority to deal with a crime committed outside of Natchitoches Parish; so far from making such a request, on his own showing he permitted the court, without objection, of its own motion, and illegally, as he now urges, to inform the jury that they were authorized to find the defendant guilty as charged in the indictment, if they found as a fact that the crime was committed in Red River Parish, but within one hundred yards of the boundary. The jury, after examination, returned to their room with a verdict of guilty, as charged, of uttering a forged instrument. The *indictment* having charged the crime to have taken place in the Parish of Natchitoches, it unquestionably appears *on the face of the papers* as well as by the *averments of the defendant's motion for a new trial*, that the jury had found as a fact, that such was the case. Appellant urges, however, that the probative force of that verdict as establishing that the jury had reached a conclusion that the crime was committed actually in the Parish of Natchitoches, is broken by the fact that the District Judge acknowledges that he had charged them that they could render the indictment as framed, convict for an offense committed in Red River Parish within one hundred yards of the boundary line of Natchitoches Parish. Defendant urges that, in view of that charge, it cannot be said *positively* that the jury *did find* as a fact that the crime had been committed actually in Natchitoches Parish; that they may have felt justified in bringing in the verdict they did under the judge's instructions; that this was permissible, even though they may have concluded the uttering was in Red River Parish, but near the line.

In support of the proposition that the jury did not necessarily find that the uttering was in Natchitoches, but was in Red River Parish, within one hundred yards of the boundary line between the two parishes, he calls our attention to the statements of the District Judge.

that, in his opinion, the great preponderance of evidence went to show that the uttering was in Red River Parish, though close to the Natchitoches boundary.

He maintains that if this was the case the verdict could not legally stand, as the case under the Constitution (Article 9) has to be tried *in the parish where the crime was committed*, and there alone.

Whether the jury reached its conclusion under the evidence that the uttering actually took place near the boundary line of that parish, is a matter which we have not the means of knowing. We would have to act upon mere conjecture the moment we leave the verdict itself as it stands recorded. By that verdict, under an indictment so charging, the jury has found the defendant guilty. We have to deal with matters from that standpoint.

Taking that as a starting point, we find the judge, in his reasons for refusing a new trial, declaring that, in his opinion, the preponderance of evidence went to show that the uttering was in Red River Parish, a few feet away from the Natchitoches line, but none the less refusing to grant a new trial to defendant.

The case is before us under very unusual conditions.

Section 988 of the Revised Statutes, to which reference is made, is a law which has been upon our books for a very long while, and has been repeatedly acted upon. Its "constitutionality" has never been denied, nor is it denied now, though it is claimed that in consequence of the wording of the present Constitution it has been repealed.

In view of the uncertainty in fact as to where parish lines are on the ground (*State vs. Gonsoulin*, 38 Ann. 461; *Tullos vs. Lane*, 45 Ann. 341), and the legal difficulties which would necessarily arise in the prosecution of crimes committed near the borders of parishes, the Legislature, to remedy the evil and to surmount the difficulties in the way of the proof of exact *venue* where transitory crimes were committed within one hundred yards of the boundary line between two parishes, fixed either parish as the *situs* of the commission of the crime, and declared in Section 988 of the Revised Statutes that they could be dealt with, inquired of, tried and determined and punished in either of the parishes, in the same manner as if it had been actually and wholly committed therein.

The District Judge, in view of this statute, whose existence and constitutionality were neither called in question, very naturally followed its provisions in his instructions to the jury. His charge to the jury is

not in the record, nor was it excepted to, and the only information we have as to what it contained, is drawn from one of the statements made by him in his reasons for refusing a new trial. That particular feature of the charge did not go at all to the question of the guilt or innocence of the accused. It went no farther than the question as to whether the jury trying the case was authorized to render a verdict in the case, either for or against the accused. At the time this trial took place, Article 9 of the Constitution of 1898, which declares that "all trials shall take place in the parish in which the offense is committed, unless the *venue* is changed," was in force. When this particular instruction was given all the facts of the case had been elicited through the evidence which had been placed before the jury. Defendant was fully advised at that time of the exact situation and was aware that the issues involved were about to be submitted to the decision of the jury then trying the case. He raised no objection whatever to that jury's passing upon his case; he made no attempt to withdraw it from them, but, on the contrary, allowed the court, without any objection or protest on his part, to instruct them that they were authorized to do so. He was willing to take his chances of a verdict at its hands in his favor. It was only after an adverse verdict that any complaint on the subject was made.

We do not think we are called upon to consider the objection urged by the defendant leveled directly against the court's charge *as such*.

It was not urged in time. We have repeatedly held that objections to a charge must be made at the time that the charge is given, and if overruled that an exception must be then taken and embodied in a bill of exception; that objections should not be postponed, to be urged after verdict, either in a motion for a new trial or otherwise, unless in exceptional cases. *State vs. Mack*, 45 Ann. 1157; *State vs. West*, 105 La. 641; *State vs. Weston*, 106 La. —. We do not think this case one which should be exceptionally dealt with; on the contrary, we think it one in which immediate objection was called for and the rule of practice alluded to should be strictly enforced.

We do not think the objection, when viewed from the standpoint of an objection to the jurisdiction of the court, is such as to call for the setting aside of the judgment of the court, and of the verdict of the jury, and the dismissal of the prosecution. We think the grand jury of the Parish of Natchitoches was under the provisions of Section 988 of the Revised Statutes, competent and authorized to "enquire into" this

crime and to indict upon it. Section 988 of the Revised Statutes was modified, but not repealed by Article 9 of the Constitution. The two can stand together. The effect of Article 9 of the Constitution read in connection with the section of the law cited gave the defendant the legal right to "object" to the "trial" in the Parish of Natchitoches, but that provision is one in the interest of accused parties, and may, if enforced under all circumstances, be in many instances directly opposed to their safety. They may invoke the protection of the Constitution, if they think proper so to do, but are not obliged to do so. They may waive it.

We do not think, as matters stand, that the *venue* of a transitory crime is a matter so fundamentally important, even in criminal matters, where the court is otherwise competent, as to affect absolutely the jurisdiction of the court. (McKenna vs. Fiske, 1 Howard, U. S.)

The objection is one *ratione personae* rather than *ratione materiae*. The constitutional provision refers to the "trial" of the criminal causes, not to the absolute jurisdiction of the court's trying them. That this is so evident from the article looking to a change of *venue*, which is a matter subject to legislative statutory control. Bishop, in his work on New Criminal Procedure, Section 123, No. 2, says: "Where the subject-matter is within the cognizance of the tribunal and the right to take jurisdiction of it in the particular instance depends on facts *in pais*, such as the residence of parties and others within the like reason, consent will, in the absence of any special circumstance forbidding, establish the required fact the same as would the verdict of a jury, so that in such case there may be a waiver."

We are of the opinion that the defendant in this cause should have manifested at some stage of the proceedings earlier than he did, and before the jury retired to their room for deliberation an unwillingness to being "tried" by it. That not having done so, but raising objections for the first time after verdict, it was then too late, as the objection reached only to the "trial" of the cause, not to the jurisdiction of the court. If the verdict of the jury in this case had been in favor of the defendant instead of against him, it would have been final and conclusive against the State. Matters would have been absolutely closed, for the State could not have gone behind it to enquire into the question of *venue* and jurisdiction or the grounds upon which the verdict was rendered. The verdict disposed of objections as to the *venue*.

For the reasons assigned, we think there is no ground for reversing the judgment, and it is hereby affirmed.

BLANCHARD and MONROE, J. J., dissent, and the former hands down a dissenting opinion.

Nos. 14,281, 14,222.

107 838
110 836

HENRY J. SANDERS vs. W. O. DITCH ET ALS.

SYLLABUS.

1. A devolutive appeal lies to test the legality of the action of a judge in refusing to allow a defendant to bond an injunction.
2. The refusal by the court of an application of the defendant to bond an injunction does not bar a second application later nor is an appeal from the second refusal barred by a failure to appeal from the first.
3. The District Court could have legally ordered, *ex officio*, a judicial sequestration of the property in litigation and have ordered the continuance of the same, until the rights of the parties should be decided. (C. P. 273-274.) It could, therefore, properly decline to allow the defendant to bond an injunction which plaintiff had had taken out which had the effect of maintaining the *status quo* during the suit. The court can still order a sequestration, or it can increase the injunction bond if the rights of parties can be better secured.

A PPEAL from the Twenty-Third, Judicial District, Parish of St. Mary—Allen, J.

Foster, Milling, Godchaux and Sanders, for Plaintiff, Defendant, in exception, Appellee.

Charles A. O'Neill and Don Caffery & Son, for Defendants, Plaintiffs, in exception, Appellants.

STATEMENT OF THE CASE.

The opinion of the Court was delivered by

NICHOLLS, C. J. The plaintiff in his petition alleged that he was the owner under titles which he set out of certain described property which was heavily timbered, the main item of same being cypress timber thereon, the said land and timber being worth the sum of Five Thousand Dollars.

That W. O. Ditch and Joseph Norgress were trespassers upon said land and denuding it of its valuable timber against the protest of petitioner; that they by their own acts or through their servants, agents or representatives had gone upon the said land and were cutting and removing all the cypress timber thereon situated, very rapidly; all of which they had done and were doing in utter disregard of petitioner's rights, without any warrant in law or title to said land; that they had carried away and pulled off a large quantity of the timber, amounting to about four hundred and fifty thousand feet (450,000), which was well worth the sum of thirteen hundred and fifty dollars (\$1350.00), and had a large quantity of the logs which were pulled from said land stored in the lake adjoining the said land, which the said Ditch and Norgress would remove at an early date, unless restrained by order of the Court.

That all of said logs, together with the logs removed from said land and sold by Ditch and Norgress, were his property, he having acquired all the rights of Cocke, and Cocke having acquired all the rights of the heirs of Martin, the original owner, and by this illegal trespass he had been greatly damaged in the sum of five hundred dollars (\$500.00) attorneys' fees, having been forced to employ counsel to defend this suit, and the further sum of five hundred dollars (\$500.00), for the illegal trespass.

Petitioner further showed that the value of the said land consisted in the cypress timber situated upon it, that the cutting and removing of same would cause petitioner irreparable injury, and that all of said timber would be cut and removed by the said Ditch and Norgress, their servants, agents and representatives, unless restrained by a writ of injunction duly issued out of this Court.

In view of the premises petitioner prayed that a writ of Injunction issue directed against Willard O. Ditch and Joseph Norgress, their servants, agents or representatives, restraining and prohibiting them from further trespassing upon the land above described and restraining and prohibiting them and each of them from pulling, floating, removing or rafting any of the cypress logs standing or lying upon the property above described, and restraining and prohibiting them from removing the logs now situated in the lake adjoining said land until further orders of this Court.

And on final trial he prayed that the writ of injunction herein issued be perpetuated, that petitioner be decreed to be the owner of the land

above described, together with the cypress timber pulled from said land, and now stored in the lake, near said land, and for further judgment, *in solido*, against said Ditch and the (\$1350.00), for the value of the timber pulled from said land and disposed of by the said Ditch and Norgress, and the further sum of one thousand dollars (\$1000.000) damages as above set forth, together with five per cent per annum interest thereon from judicial demand. He prayed for all orders necessary and for general and equitable relief and costs.

The Court ordered an injunction to issue as prayed for in plaintiff's petition, on plaintiff's furnishing the bond in the sum of seven hundred dollars. Bond was executed and an injunction issued and served.

Plaintiff filed a supplemental petition in which he averred that when he filed his first petition he averred there was a large quantity of logs pulled from his land and stored in the lake adjoining the lands, and he secured the injunction restraining and prohibiting the said Willard O. Ditch and Joseph Norgress, the defendants, their servants, agents and employees, from removing of same or disposing thereof.

He showed that between the time the injunction was issued and the same was served, that about three hundred and forty of said logs were removed by the steamboat called the Albert Hanson; that the same are being towed to the mill of the Albert Hanson Lumber Company, Limited, by the steamboat Albert Hanson, which belongs to said company.

That the Albert Hanson Lumber Company, Limited, was aiding, assisting and abetting the said Willard O. Ditch and the said Joseph Norgress in depleting the said land of its timber and in removing the same from the land and the lake adjoining said land, and it was necessary that the said Albert Hanson Lumber Company, Limited, a corporation organized under the laws of Louisiana, through its President, Albert Hanson, be made a party defendant to this injunction restraining and prohibiting it, its agents, servants and employees, from in any manner disposing of the logs above named, which said company, through its agents and representatives, had removed from the lake.

He adopted all and singular the allegations and prayer of his original petition, and filed this supplemental and amended petition for the purpose of making the said Albert Hanson Lumber Company, Limited, a party to this suit, and for the purpose of securing an injunction

against said company, restraining and prohibiting it from removing or disposing of the logs in controversy.

In view of the premises, petitioner prayed that this amended petition be filed and allowed, that there be service of same upon Willard O. Ditch and Joseph Norgress, and that there be service of this and the original petition, together with citation upon the Albert Hanson Lumber Company, Limited, through its President, Albert Hanson, and on final trial, he prayed for judgment as in his original petition. He prayed for all orders necessary and for general and equitable relief.

The Court ordered the Albert Hanson Lumber Company, Limited, to be made a party to a writ of injunction to issue against it as prayed for in plaintiff's petition, on plaintiff's giving bond in the sum of five hundred dollars. The bond was furnished and the injunction was issued and served.

The Albert Hanson Lumber Company, Limited, filed a petition, in which alleging that the timber which they had been enjoined from using, was movable property in its possession and had never been in possession of the plaintiff, that it would deteriorate unless properly sawed and converted into manufactured stuff, prayed that it be permitted to manufacture the logs into lumber and enjoy its possession thereof, and enjoy the rights of ownership, which it was enjoined from exercising, upon furnishing bond in such sum as the Court might fix. Upon reading this petition the Court ordered that the applicant be relieved from the injunction issued against it upon furnishing bond in the sum of eighteen hundred and ninety dollars. The bond was furnished as required.

The defendants, Ditch and Norgress, next applied to the Court for permission to bond the injunction under Art. 307 of the Code of Practice, on the ground that it appeared on the face of the petition that the act prohibited was not such as would work irreparable injury to the plaintiff, that the land of which he claimed to be the owner was alleged by him to be worth \$5,000, and, therefore, the pretended injury would be reparable by money compensation, the amount of which was fixed by plaintiff's allegations, that applicants to bond were at the time of the filing of plaintiff's suit, in possession as owners of the property mentioned in the petition, and plaintiff did not allege that he was in possession or had possession of the same. On the 24th of May, 1901, plaintiff was by the Court ruled to show cause on the 29th of May, why the injunction should not be bonded as prayed for upon this

rule. After hearing, the Court rejected the application. On the 5th of June, the defendants filed what they styled an exception or contingent answer, should the exception be overruled, in which they averred that the plaintiff was attempting to enforce a litigious right, purchased by Albert R. Cocke, a deputy sheriff of the court, from the heirs of W. C. C. Martin, and purchased by the plaintiff from said Cocke, with full knowledge of his official capacity, that the sole object of the transfer by Cocke to plaintiff was because both parties knew the pretended rights could not be exercised without undergoing a law suit, that they both knew before either or both purchased the rights from the Martin heirs, that they could not be exercised without undergoing a law suit, that defendant, Ditch, was in full and absolute possession of the property on which defendants were enjoined from cutting timber, under a good and valid title translativ of property duly recorded, and that he possessed as owner before the transfer of said pretended rights to Cocke, and that Cocke and the heirs of Martin had never had any character of possession of the land on which defendants were enjoined from trespassing, and that the plaintiff had never had any character of possession thereof since his purchase from Cocke, that any rights which the heirs of Martin may have had had become absolutely null and void, if the court should hold that same be not null, and that they still existed, they pleaded in the alternative, that they had the right to be released from the litigation, on paying the real price of the transfer \$1650, with interest which they were well willing to do, if the alleged rights be not annulled and held to really exist. They prayed that the suit be dismissed and the injunction dissolved.

This pleading was over plaintiff's objection taken up as a peremptory exception and evidence adduced, but before the testimony was closed, the term of Court ended and further consideration of same was continued. Defendants then presented another petition to dissolve the injunction which the Court again refused on the 9th of September. In its reasons for this action, the Court said:

"In this application defendants aver that by persistently and constantly trying to introduce evidence affecting the merits of the demand and not pertinent to the question of his having bought a litigious right, the plaintiff has caused the trial of the peremptory exception now pending to be postponed until next October, to the grave and serious injury of defendants and to their deprivation of a speedy trial."

They aver "that on the trial of the original motion to bond, the plaintiff averred that his action was one purely of trespass, and not a petitory action; that since the refusal to bond, the plaintiff has admitted and shown that he had not the possession essential to enable him to retain the action of trespass, and that in order to maintain his position in Court, plaintiff now judicially claims through counsel that his suit is a petitory action, and that in neither case is an injunction legal."

The remaining grounds urged are the same as urged in the original application.

The defendants are sued as trespassers; as trespassers they are enjoined from denuding the land and cutting and taking from it the cypress timber which alone gives the land enhanced value.

Under the allegations of the petition, the injunction rightfully issued, if these allegations are true, and for the purpose of this motion they are taken as true, the Court could not legally turn over the property to a trespasser, to denude and cut from and appropriate the timber thereon.

To cut and work up the timber is the avowed purpose of the defendants, for their complaint against the writ is that it interferes with their large milling interests.

It is true that they state in their motion, that they possess the property by virtue of a recorded title. The sworn allegation of the petition declares that they are trespassers; an averment that only amounts to a denial of this charge, does not give the right of itself to bond.

The plaintiff alleges ownership and swears to it, and charges defendant with committing an offense by devastating his property, and obtains an injunction, the defendant denies the charge, alleges possession on the strength of a recorded title, and asks to dissolve on bond.

The interest of each party is to have the property preserved to him; the law certainly considers that it is to the best interests of him to whom the property may ultimately be adjudged to maintain the *status quo*.

The dissolution of the injunction on bond will destroy it, because the avowed purpose in seeking to dissolve is to divest the land of all the cypress trees growing thereon.

If the *status quo* cannot be preserved by the writ of injunction, the law provides other and more certain remedies to preserve it.

Defendants, however, claim that they have a right to bond the injunction under Article 307 of the Code of Practice, because the act prohibited is not such as may work irreparable injury to the plaintiff; this Article declares in effect, that when the injury is reparable in money, the Court may in its discretion dissolve the same, etc. They contend that plaintiff has fixed the money value of the property when he says that it is the timber that gives value to the land and that the timber and the land are well worth five thousand dollars.

The plaintiff contends that this allegation was made to fix the jurisdiction. Be that as it may, assume that the value of the property is five thousand dollars, does it follow that because real property is given an expressed value by the alleged owner in an injunction proceeding wherein he sues to protect it against an alleged trespasser, that the latter has the right to dissolve the injunction on bond in the amount fixed, and then take possession of and change the character of the property? In other words, can the owner be forced to part with his real property in an *ex parte* proceeding, even at the value which he himself has placed upon it?

Now the defendants are frank enough to admit that they do not intend, should they be permitted to bond the property, to return in its present condition, but they intend to convert it for milling purposes; Article 307 of the Code declares that the bond is a security that he will deliver the property in dispute in the same state in which it was at the moment of issuing the injunction. Defendant contends that the bond stands in lieu of the property, and for damages done to the property if this be so, then plaintiff if he is successful in the present suit will be compelled to bring another action to recover on the bond.

This brings in application the following principle of law. If the dissolution of an injunction bond may have the effect to compel the plaintiff to institute a new action on the bond after the determination of the suit, it may so change the condition of the parties that the final judgment in the case will not end the controversy. 23 A. 51; 12 Ann. 455.

Where the consequences of an interlocutory order are such as they cannot be remedied by a final decree and the party will be driven to another action to obtain his rights, it is irreparable injury.

Defendant contends that this law does not apply to this case; yet it seems clear that the same principle of law is involved here as was applied in the case cited in 23 Ann. 51.

The condition of the security required by the Code of Practice, Art. 307, is the return of the property in the same state and the payment to plaintiff all damages he may have sustained by this act.

Defendants also contend that the injunction should now be dissolved on bond, because, as they contend, on the partial trial of the said plea of nullity, wherein they seek to dissolve the injunction, on the grounds that in purchasing the land plaintiff knowingly purchased a litigious right; it is shown that the action is not one of trespass, but a petitory action; and that plaintiff, through his attorneys, judicially claimed the same, in order to maintain his position in Court; and that on the trial of said plea of nullity the plaintiff persistently delayed the trial thereof by seeking to introduce evidence of title which caused the matter to go over, to their great injury.

I think that this matter must be considered from the face of the papers and not on the incomplete testimony introduced on a partially tried exception or motion to dissolve. My remembrance during the argument of this motion, that plaintiff's attorney contended that from the averments of his petition that defendants stood before this Court as trespassers, as violators of the criminal statutes of the State, and that no law permits a person to bond an injunction under such circumstances.

It is not regular to decide this matter on the incomplete evidence had on the partial trial of the exception; it may be that when that trial is concluded, the Court might dissolve the injunction for the causes therein alleged, but this matter must be received from the standpoint of its own merit.

It may ultimately be shown that the lines sworn to by Ditch embrace the property in contest. He swears on the trial of the exception that they do; Sanders swears that they do not; Sanders swears that even if the lines are drawn just as claimed by Ditch they would not reach the property in dispute by some distance.

The Court cannot conclude this matter, by what is incomplete and inconclusive in another matter.

The property in dispute is real property.

The injunction is levelled against defendants as trespassers, prohibiting them from cutting trees thereon and wasting that which gives value to the land, the growing timber.

The law favors the *status quo* even in contests for the ownership of land.

Article 307 of the Code of Practice requires the return of the property in the same state as it was when the injunction issued; the avowed purpose of defendants, if the injunction is dissolved on bond is to cut the timber and convert it into lumber for commercial purposes, which may give rise to another action to settle ultimately the rights of the parties; therefrom, after a careful consideration of this second application to dissolve the injunction on bond, a consideration which has been more careful on account of the earnestness and ability with which the second application has been presented, I feel that I cannot in the exercise of that legal discretion with which the law invests me, grant the application.

The application to dissolve on bond the injunction sued out in this case is hereby refused."

On the 14th of October, the Albert Hanson Lumber Company was granted at chambers an order for a devolutive appeal from this judgment returnable on the 18th of November. A bond was executed as required by the order.

On the 17th of December, 1901, the defendants, Ditch and Norgress, applied by petition for and obtained an order for a devolutive appeal from the same judgment returnable on January 2nd, 1902, on furnishing a bond for two hundred dollars. Citation of appeal was served personally on the plaintiff on the next day, the 18th of December. The appeal bond was executed and filed in the clerk's office of St. Mary on January 2, 1902.

Plaintiff moved to dismiss the appeal taken by the Albert Hanson Lumber Company, on the grounds that it had no rights affected by the judgment of the Court, nor any interests in the judgment of the Court refusing to bond, that so far as it had any interests in the matter, they were unfavorably acted upon by the Court. The ground is well taken. That company was accorded by the Court the full relief which it claimed and asked to have accorded to it in the premises. The appeal taken by it is dismissed.

Plaintiff asked that the appeal taken by the defendants be dismissed, on the ground that no appeal lies from an interlocutory order of the District Court refusing to dissolve an injunction on bond, in a case of this character. That no irreparable injury can be worked to defendant and appellant by the refusal of the Judge to bond the injunction, that the dissolution of the injunction on bond is left to the discretion of the Court, and no appeal lies from the exercise of that power, especially

when the object of the dissolution of the injunction is to change the possession thereof in the immovable property, and place the possession thereof in the party defendant who is sued as a trespasser upon the property.

That the defendants, Ditch and Norgress, applied to the District Court on May 25, 1901, to dissolve said injunction on bond, that the Judge upon trial, refused to bond the same; that no appeal was taken from said judgment, but on the contrary all parties interested acquiesced in said decree, and subsequently filed what is termed a peremptory exception, but really an answer to the demand of plaintiff and proceeded to trial upon said exception, and to the taking of evidence thereunder, and while said exception was still on trial on the 19th of July, 1901, and without appealing from the judgment rendered refusing to bond, defendant made this second application to dissolve, and the same being refused, this appeal was taken from said judgment, that the issues involved in said application are the same as those presented in the first, and having acquiesced in the first and failing to appeal therefrom, they are barred by their conduct and the judgment rendered upon the first application.

That the defendants on the trial of the said exception having declared and admitted to the Court that the object of the dissolution of the injunction was for the purpose of allowing them to take possession of the land in controversy, and to cut and denude and remove the timber therefrom, appellants are estopped from declaring that they sustained irreparable injury by the judgment, or from claiming the right to appeal under Art. 307 of the Code of Practice.

The claim on the part of the appellee that the defendants are not entitled to appeal for the reason that the injunction does not work them an irreparable injury, assumes the very fact which it is the object of the appeal to have tested. They were entitled to refer the matter to this court, leaving to it to decide whether or not they were entitled to bond under the pleadings. We do not think that by not appealing from the first refusal of the court to allow them to bond, they lost their right to renew their application to bond at a later period by reason of their supposed acquiescence in the correctness of the original refusal. That judgment, if it can be so termed, was interlocutory in character and subject to modification or complete alteration later. It frequently happens that action of some kind, improperly asked and properly refused, can at a later stage be properly asked and granted.

It is evident that defendants believed that the court had come to a knowledge of the facts, through the evidence which was adduced upon the trial of the other exception, which might influence its judgment in determining whether they were warranted in having the injunction bonded, but the judge declined to act upon partial evidence taken on a separate issue, and ruled against the defendants, evidently on the face of the papers, and it is from that standpoint we also must act.

Defendants urge that they are in full possession of the property on which they have been cutting timber in good faith under an act transalative of property duly recorded. Plaintiffs assert, on the other hand, that they themselves are the legal owners of the property, and that the acts which defendants rely upon as acts of ownership and possession under a title are in fact acts of trespass; that defendants are trespassing upon his property. Defendants unquestionably hold a title to some property, but the very question at issue is whether it is this particular property or not. That matter can be determined only after a trial upon the merits. Defendants do not claim that the acts upon which they rely as acts of ownership and possession antedate the bringing of this suit by a year and placing them in a position to be considered provisionally as owners in possession under Article 3454 of the Civil Code.

The lands involved in this litigation are evidently swamp lands, of which neither party has had nor has now actual continuing corporeal possession. We do not think the owners of such lands have to be or to have been in the actual corporeal possession of the same as a condition precedent to protecting their rights therein by injunction from the acts of parties alleged to be depredating upon the same by cutting down the timber thereon as trespassers.

Defendants press upon us, earnestly and with force, that if, in point of fact, they are the owners of the land and entitled to cut the timber, plaintiffs have summarily, by means of a small bond, checked them in the prosecution of their lawful business (if they have not put an end), to very extensive operation, in which, at great expense, they have been engaged. The bond demanded of the plaintiffs by the court impresses us as being entirely too small to sufficiently protect the defendants' interests, if their claims of resulting damage are well founded, but they have made no attempt to have the bond increased by the court or made any showing in support of an increased bond. They would be entitled to make such a showing in the District Court

and to have the bond increased, if not sufficient. Defendants urge upon us that the timber which has been cut and is lying upon the ground is being daily damaged and deteriorated, and they ought to be permitted to take charge of and have it manufactured. Plaintiffs, on the other hand, urge that if the defendants take possession of it, they will never be able to recover its value. It will be noticed that the defendants do not seek to bond the injunction partially so as to enable them to take possession of the timber lying upon the ground, but demand to have the injunction bonded as a whole, which, if allowed, would authorize the continuing of their cutting the timber. We think the occasion a proper one for the exercise by the court of its power under Articles 273 and 274 of the Code of Practice, to order *ex officio* a judicial sequestration of the property and to order the sale of the felled timber upon the ground, if in fact it is being damaged, unless other remedies in the premises are sought by the defendants. This case closely resembles that of *State ex rel. Dowdell vs. Allen*, Judge (105 La. 167). We do not think, however, we are called upon, as matters stand, to do more than deal with the particular order appealed from. We cannot say that the court erred in the exercise of the discretion conferred upon it by Article 307 of the Code of Practice, and therefore, and for the reasons assigned, the action in the premises is hereby affirmed.

No. 14,360.

STATE OF LOUISIANA VS. ROBERT J. WILSON.

SYLLABUS.

1. The law of Louisiana makes no distinction between larceny from the person and larceny otherwise than from the person. The thief who secretly steals money by picking the pocket of the owner is as much guilty of larceny as though he had stolen it otherwise than from the person of the owner.

A PPEAL from the Criminal District Court, Parish of Orleans—
Baker, J.

J. Ward Gurley, District Attorney of the Parish of Orleans, for Plaintiff, Appellee.

John J. Reilly and James O'Connor, for Defendant, Appellant.

The opinion of the Court was delivered by

BLANCHARD, J. Defendant was charged, by bill of information, with petit larceny, tried by jury, convicted, and sentenced to imprisonment at hard labor for two years.

He appeals.

The specific offense averred against him was that he feloniously did steal, take and carry away seventy-six dollars in lawful money of the United States, the property of one J. J. Bender.

The case comes here on a bill of exceptions taken to the ruling of the trial Judge declining to grant a new trial.

From a statement of facts embodied in the bill it is learned that the evidence adduced on the trial showed the money was stolen by the accused from Bender—secretly abstracted from his pocket—while he was riding on a street car.

The point made in the bill and at the bar is that the money having been taken from *the person* of the prosecuting witness, a verdict of guilty on an information charging the crime of simple larceny is contrary to law.

It is contended that petit larceny is a felony—made such by our statute; whereas, taking money from the person is a misdemeanor—made such by another statute; and that defendant was found guilty of the first and sentenced to the penalty prescribed for such felony, while in point of law, bearing on the facts admitted, he was guilty only of the second—the lesser offense—and should have been sentenced as for the misdemeanor.

In its last analysis, the contention is, that the taking of the money secretly from the pockets of the clothes worn by the prosecuting witness is not larceny, but a lesser crime.

In support of this, reference is made to Section 811 of the Revised Statutes, which reads as follows:

Whoever shall be found guilty of attempting to rob from the person of another money or other property, by cutting or tearing the clothes, thrusting the hand into the pockets, or otherwise, though he do not succeed in such attempted robbery, shall, on conviction, be sentenced to imprisonment not less than six months, nor more than two years, and fined not exceeding five hundred dollars.

It is urged that the accused, under the admitted facts, if guilty at all was guilty under this statute, and it was an error to refuse a new trial

on a conviction under the statute denouncing a penalty against simple larceny.

Reliance is had upon *King vs. State*, 54 Ga. 184 (Am. Crim. Rep., Vol. 1, 426), but that case is not found to be in point because of difference between the Georgia statute and our own.

One section of the Code of Georgia declares that if any person shall take and carry away any bond, note, bank bill or due bill, or paper or papers, securing the payment of money, etc., with intent to steal the same, such person shall be guilty of simple larceny. By another section of the same Code, theft or larceny *from the person* is defined to be the wrongful and fraudulent taking of money, goods, chattels or effects, or any article of value, from the person of another privately, without his knowledge, with intent to steal the same.

"Simple larceny" and "larceny from the person," therefore, are in Georgia distinct offenses. Not so with us. Larceny, here, *is larceny*, pure and simple, whether the thing taken be abstracted from the clothes worn by the owner, or elsewhere than from his person, so that there be a felonious stealing, taking and carrying away. And by Section 310 of the Revised Statutes the robbery or larceny of money is punished in the same way as the robbery or larceny of goods and chattels.

We have a statute denouncing penalties against the crime of larceny; another denouncing a penalty against the crime of robbery; and still another denouncing a penalty for *attempting to rob* from the person of another money or other property. This last is the one hereinbefore quoted.

It will be noted it is confined to attempts *to rob* from the person. Nothing is said of attempts *to steal* from the person.

Robbery and larceny are distinct crimes. The first is accomplished through violence or a putting in fear. So with an attempt to rob from the person of another. It is something more than attempting *secretly* to steal from the person. It carries with it the idea of violence or a putting in fear and the attempt to take something of value under these circumstances.

If the law-maker had intended the statute to apply to attempts *to steal* from the person, as well as to rob from the person, he would have said so.

In the instant case, the charge was stealing money belonging to another. The proof was the money was stolen from the clothes worn by

Boyle, Tutor, vs. West et al.

the owner. In other words, his pocket was picked. This was larceny and the verdict so declaring was legal, as was, likewise, the imposition of the penalty as for larceny.

Judgment affirmed.

No. 14,113.

ROGER T. BOYLE, TUTOR, vs. JOSEPH B. WEST ET AL.

SYLLABUS.

1. The right of plaintiff to sustain an action must be made evident before defendant can be made to show title in himself.
2. An act of donation, null and void, cannot serve as a basis for a petitory action.
3. Estoppel does not affect those who did not acknowledge the right which one claims.
4. The asserted donor not being estopped and being at liberty as relates to the act of asserted donation to claim the property, and return into its possession as owner, those who bought this property without notice by recital in any deed in which they were concerned that this particular property had been donated are not bound by an informal act of attempted donation.
5. The act was never accepted by the transferee who died years ago.
6. Irregularities in a tax deed and all errors of form not of such a character as to render a tax deed absolutely null and void, are cured by the prescription of three years.
7. The tax deed attacked was not absolutely null and void.

A PPEAL from the Eleventh Judicial District, Parish of Red River.
—Porter, J.

Sutherlin & Hall, for Plaintiff, Appellant.

Alexander & Wilkinson, for J. B. West, Defendant, Appellee.

Alfred Dillingham Land, Jr., for Marshall Heirs and Green Bros., Defendants, Appellees.

Wilkinson & Carter, for A. Williams, Mrs. Bertha Williams and Mrs. N. B. Walmsley, Defendants, Appellees.

The opinion of the court was delivered by

BREAUX, J. The suit was brought by plaintiff, tutor and guardian of

his minor child, against the defendant, Joseph B. West, to have a tax sale decreed null. The land claimed is an undivided one hundred acres in a tract measuring eleven hundred and twenty acres, and is also referred to as part of a fourth of the tract, that is, one hundred acres of two hundred acres of the eleven hundred in question. This land was given to the plaintiff's late mother by Mrs. Mary A. Nelson.

On the ninth of July, 1892, the tax collector sold this undivided interest (which plaintiff claims by inheritance from her mother) at tax sale to Sam Lisso, Katie Lockett, and Paul Lisso, and executed a tax deed to them as buyers. Plaintiff avers that this sale is null because the assessor sold it without warrant, and, further, that the property was not correctly assessed; that the tax deed does not show for what year the taxes were claimed for which the property was sold; that the assessment was never signed or verified in any way; the assessment was not made in the name of the owner, who was an absentee without legal representative; that the assessment was made in the name of the tutor; that the advertisement was illegal; that the tax deed is incomplete as it does not set forth the day of sale, or the hour, or the date from which, and to which, the property was advertised, the amount of each, the State and parish taxes, interest and costs. Plaintiff also contends that the tax collector did not offer the least quantity of property anyone would buy for the amount of the taxes, interest, and costs, and that no notice was ever given to the owner of the property.

In order to meet any possible attack on the title of her mother, from whom she inherited, plaintiff averred that in July, 1893, the eleven hundred acres before mentioned, less the one hundred acres interest, which had been transferred by Mary A. Nelson to plaintiff's mother, were sold at sheriff's sale to Henry and Charles Newman, and in 1894, they, Henry and Charles Newman, sold the same land, less the one hundred acres before mentioned. To prove the recognition of her title by defendants, plaintiff further alleged that in different acts particularly referred to, her land was always excepted, save in an act of partition entered into by the different owners. In this act of partition, however, as shown by recitals of the procurement of the agent who represented defendants' author, a reference is made to the land claimed by plaintiff in such terms as plaintiff claims was a recognition of her title.

The fact remains that in April, 1900, Mrs. Bertha Williams, defendants' author, sold to him, defendant, four hundred and fifty acres of land embracing the one hundred acres before mentioned, and that no reference whatever was made in the deed of transfer to the one hundred acres which were transferred to the defendant, together with other lands of the vendor, including these undivided one hundred acres.

Defendant, on the other hand, contends that plaintiff never was the owner of the one hundred acres in question, and attacks the act under which she claims as an illegal and invalid donation. In case this defense be overruled, the defendant further contended that the tax sale, plaintiff in this suit attacked, is valid. The warrantors appealed in the case and joined issue with the plaintiff.

We will refer to other facts, not before noted as may become necessary, while considering the issues of the case. The judge of the District Court rejected plaintiff's demand. From this judgment, plaintiff appeals.

We announce nothing new in stating that a *bona fide* possessor, under a title *prima facie* good, can, when sued, compel the one by whom he is sued to show that he has a title better than his own. Heirs of Delogny vs. Mercer, 43 Ann. 205.

Plaintiff contends that "*all parties to this suit trace their title to a common author; that each defendant has recognized plaintiff's title in written acts under which he claims to hold plaintiff's land.*" If at any time within the course of this litigation, learned counsel should succeed in proving the correctness of the proposition just announced, our conclusion on this point of the case would have to be changed.

The defendants and plaintiff do not trace their title to a common author, for, as relates to a transfer in commerce as between vendor and vendee, plaintiff has no title. We use the words vendor and vendee just above for the reason that while plaintiff's title may be title enough to justify an assessor in assessing the property in her name, it is not sufficiently legal to prevail against one, as defendant here, owning an adverse title and holding an adverse possession.

Plaintiff produces an act of asserted donation under private signature which has never been accepted by the late donee, which is so absolutely null that it cannot be ratified by the donor without an authentic act covering all essential formalities and which would be without effect against third persons, save from the date of ratification.

The attempted transfer by Mrs. Nelson is unquestionably an absolute nullity.

Plaintiff's contention is that the title, such as it is, has been vitalized by the acts and avowals of the defendants as made evident by the recitals in deeds to which they were parties.

The procuration held by the agent of Mrs. Williams, defendants' author, excepted the one hundred acres as not to be included in the partition. Through this procuration she was a party, and at most, if any one was bound by its terms, she was, and not the other parties to the act who took no part in recognizing any title in plaintiff. They ignored all rights in her and divided the property, each in proportion of one-fourth. By the effect of this act, each to the extent of his interest, acknowledged the title of the others.

At most, they may be held to have admitted that their co-partitioner, Mrs. Williams, in the procuration, recognized the title of plaintiff, but the force of this is broken by the fact that Mrs. Williams' agent ignored the clause in question in the procuration and joined the other owners in dividing the property without the least reference to the one hundred acres in question. Plaintiff seeks to hold her bound to a recognition of her title, because, subsequent to this act of partition, Katie Lockett and Sam and Paul Lisso, who had bought at tax sale, sold her the property in question.

This was not recognition, particularly of the validity of plaintiff's title. She sought thereby to perfect her title. It remained that by the terms of the act she only held one-fourth of the property in dispute to which she sought to confirm her title as if, as we believe was the case, she was considered to have received the one hundred acres in the partition, she only became owner of the rights under the tax deed she bought and she sought an absolute title to this last mentioned land by buying the title of the buyers at tax sale before mentioned. In other words, she, at the date of the partition, only owned one-fourth interest, *less the one hundred acres*.

Be this as it may, should West be held to admission made by his vendor to such an extent as that he is estopped from questioning the title under which plaintiff claims? To this we answer he has never committed himself to the validity of this title.

If the act attacked as an invalid donation was binding enough upon the asserted donor and donee to justify the assessor in assessing it in

the name of the latter, although not binding as a legal act on the ground that the assessor is not called upon to investigate the validity of titles of record, the defendant who substantially became the owner of the title cannot be held estopped because some one in interest, prior to the sale, chose to recognize the illegal act.

The court has decided that "it is no part of the assessor's official duty to call in question the verity of that title and go back to a former title." Prescott *et als.* vs. Payne, 44 Ann. 656; Williams vs. Landry, 47 Ann. 5.

It may be one of the sales in the chain of title and yet leave the defendant in a position to urge successfully that the title under which plaintiff claims, being one which the donor may, if she chooses, recall and treat as void, is not one by which he should be held bound. It must be borne in mind that the defendant traces title both to the act of partition and to the tax sale.

We take it that plaintiff's transfer is not claimed as a title, but it is invoked to support the plea of estoppel. A plea not particularly favored and not to be sustained unless it is evident that the one against whom it is pleaded, is estopped.

On the face of the papers, the defendant had the right to assume that each party to the partition had a good title to the extent of his interest, and that each was committed to the title.

Although tempted to stop here, in our study and discussion of the issues, we take up for decision the other contentions involved, growing out of the plaintiff's attack on the tax sale.

Plaintiff contends that a tax deed must recite and show legal authority of the officer to sell. We think that on this score the tax deed substantially complies with the requirements of law. True, there may be deficiencies in the recitals, but they are not, as we think, beyond the curative effects of the prescription pleaded.

The next objection of the plaintiff is that Act 106 of 1890, confers no authority to sell; that the tax deed recited that the tax sale was made in pursuance of the Constitution and laws of the State and especially the act just cited; and that this specialized and restricted the deed to the cited act and that the deed cannot be maintained on the ground that Act 85 of 1888, not referred to herein, authorized the sale.

The court has considered a similar question and decided adversely to the contention that plaintiff now sets up. The sale it was said

in the decision cited *infra* was vitiated because the deed referred to a repealed act as warrant for the sale and to no other acts. The court held that this did not have the effect of vitiating the sale. *Sims vs. Walshe*, 49th Ann. 781.

Decisions in tax matters establish a rule of property which will not be disturbed unless it is manifest that an error has been committed.

Plaintiff urges that *a tax deed must recite and show for what year the taxes for which the sale was made were assessed*. The taxes were due and the evidence showed the year for which they were due. Whatever irregularity this may have been, we consider that it falls within the curative effect of the three years' prescription pleaded. The record of evidence other than the deed properly admitted, we think, shows that the property was sold for the taxes of 1891. This evidence only went to supply blank places in the deed, evidently omitted by oversight.

Another ground of complaint by plaintiff is that *Section 27 of Act 96, Extra Session of 1877, required the assessment rolls to be signed by the assessor and certified to by him under oath, and prescribes the form of both*. This would perhaps have some weight if timely urged. We are convinced that it was never the intention of the Legislature to leave it in the power of a negligent assessor to defeat the collection of the taxes by his negligence to properly sign the rolls.

In *Oteri vs. Parker*, 42 A. 374, a case it is true, from the Parish of Orleans, the want of legal authentication, it was held, did not vitiate the assessment.

The statute cited above, as not repealed, was general, and to have effect throughout the State. The court having decided that the omission to authenticate in time, did not operate nullity of an assessment in New Orleans, the ruling must be equally as good in the parishes.

The next ground as stated by the plaintiff that *where a mother resides and dies in Texas leaving lands in this State and as her only heir a minor child in Texas where the father is qualified as guardian there, but never recognized as tutor here, under C. C. 863, and the heir has never been put in possession, the property ought to be assessed in the name of the estate of the mother as the owner. The assessment in the name of the father is null. The assessment must be in the name of the owner*.

We can only say in answer: the name of the owner of the property

is descriptive; a tax sale may be made and acquire validity in time, although there is an irregularity in this respect. We must say that assessment in the name of the tutor, as plaintiff contends, should have been done, would not have been any more in the name of the owner than it was when it was assessed in the name of the tutor.

Description, says the plaintiff, must be sufficient to identify the property and put the purchaser in possession; the substitution of the word "of" for "and" in the assessment excludes all lands not indicated in the erroneous description. This, to an extent, is true. It may well be, none the less, that despite the clerical error made in substituting the word "of" for "and" there remains enough of the description to identify the property. The designation which affords ample means of identification. Cooley on Taxation, p. 286.

The asserted want of notice is another of plaintiff's grounds of complaint. This always presents an issue of importance. Notice is a fundamental and judicial requirement never to be overlooked or slightly considered. Here the question resolves itself into one of fact. There was notice as shown by the usual indicium kept by the sheriff by whom it was mailed and, besides, the tutor was specially written to by the sheriff and tax-collector in regard to the delinquent taxes prior to the sale and answers were received to these letters.

Plaintiff questions the legality of notice by the tax-collector sent to the tax-payers who reside out of the State. This, were it sustained, would place beyond the possibility, frequently, of collecting taxes from absent owners, although all property is subject to the levy of the tax and the owners to its payment. A notice sent beyond the limits of the State is, in our views, if received by the tax-payer, as binding as if delivered to him within the confines of the State. The law making power has established a method of giving notice which is binding when received even beyond the State limits.

The collector says plaintiff was required to sell the least quantity of property which any bidder would buy for the amount of the taxes, interest, and costs. Const. 1879, Art. 210; Act 85 of 1888, Section 53. The collector "did then and there offer for sale, at public auction to the last and highest bidder the least quantity of said land anyone would buy for the amount of taxes" and he declares in the deed that he offered to the last and highest bidder the least quantity anyone would buy, but there is another recital setting forth that he sold the whole property to the highest bidder, in this, somewhat conflicting

with the first recital here mentioned. The defendant supplemented the deed by showing that the collector did offer the least quantity.

We find it impossible to agree with the learned counsel for the plaintiff in the statement that it is not sufficient that the *deed or proof should show merely that the offer was to sell the least quantity anyone would buy, but that it was necessary that the collector should designate some particular or specific portion or quantity so that the purchaser would know the extent and situation of the property proposed to be sold and so that delivery could be made.*

We have seen that the property was undivided. In consequence, it was not possible to offer a specific portion, and it became necessary, in order to effect a sale, to offer it, as it was offered, to the highest bidder who would buy the least quantity.

In the cited case of *Land Co. vs. Fasnacht*, 47th Ann. 1294, and *Bristol vs. Murff*, 49 A. 357, the court was not dealing with the sale of property held in indivision. Moreover, we do not think that either of these decisions sustain the view that under all circumstances the least specific quantity or the particularly described property should be offered.

With reference to the objection that verbal testimony was not admissible to correct or supply omissions in the deed, we can only say that the tax sale conveyed the property, and that even after the deed had been signed it was possible, within proper limits and restrictions, to make such corrections as were needful to make the deed correspond with the facts; in other words, to make it the proper record of the manner in which the law was executed.

This brings us to defendant's plea of prescription of two, three and five years. When the nullity is not absolute and the act void, the prescription of three years will operate as a bar to a judgment setting aside a tax sale. *Breaux vs. Negrotto*, 43rd Ann. 426; *Sinnott vs. City*, 43 A. 726.

The facts with reference to prescription are: The sale attacked by plaintiff is dated July 9th, 1892. Suit was brought January 7th, 1895, to set aside the tax sale. Plaintiff failing to appear when called, his suit was dismissed on 9th January, 1897. The present suit was brought in March, 1901, more than three years after the dismissal of the first suit.

We have gone beyond the limits we intended, after we had made an analysis of the facts. Returning to our original purpose, we feel

justified in holding that the defendant holds under a tax deed, at least, *prima facie* valid, and that he has a right to possession until the owner sets up and recovers on a valid title. There is, in our view, an outstanding title, which is in the way of any action of plaintiff standing in judgment as one having the right to have a tax title, which is, at least, *prima facie*, decreed a nullity.

For the reasons assigned, the judgment appealed from is affirmed. PROVOSTY, J., not having heard the argument, takes no part. Rehearing refused.

No. 13,930.

THEOVILLE LEBLANC AND WIFE VS. DANIEL E. SWEET, ET AL.

107 355
114 995

107 355
118 4
118 819
120 1023

SYLLABUS.

1. A common carrier is bound to exercise the strictest diligence in receiving a passenger, conveying him to his destination, and setting him down safely, that the means of conveyance employed and the circumstances of the case will permit.
2. There is a broad difference between the obligations of a carrier, to a passenger, and his obligations to a third person, complaining of tort; the burden of proof, in the latter case, save where otherwise provided by statute, resting upon the claimant, to establish both the injury and the negligence which caused it; whereas, in the former case, it is sufficient, in order to throw the burden of explanation on the carrier, for the passenger, suing on a contract for personal carriage, to establish the contract, and to show that he has not been safely set down at his destination. It is, then, for the carrier, and not the passenger, to show what negligence, and whose, prevented the fulfillment of the contractual obligations of the carrier.
3. Where a girl takes passage on a steamboat and is drowned upon reaching the point at which she expected to leave the boat, in an attempt to transfer her to a skiff, the burden of proof rests on the carrier to show that such occurrence did not result from the fault of his officers or representatives.
4. There is danger in attempting such transfer, at night, and whilst the boat is in motion, of which the carrier ought to be aware, and to which he has no right to subject an ignorant and inexperienced passenger, and, in so doing, he assumes the risk of the consequences.
5. The damages recoverable by the surviving parents, for the loss by drowning of their daughter, a girl of sixteen, may include expenses incurred in finding and burying the body, loss of services and of filial offices, as also the amount which the daughter, herself, was entitled to recover, at the moment of her death.
6. Where an action in damages is brought against the owner, and also the master, of a steamboat, and it appears that, in the transaction out of which the action arose, the master was acting in his representative capacity, the owner, alone, is liable.

A PPEAL from the eighteenth judicial district, parish of Acadia—
DeBaillon, J.

Story & Pugh and *Thomas R. Smith*, for plaintiffs, appellants.

Philip J. Chappuis (*John D. Grace*, of counsel), for defendants,
appellees.

The opinion of the court was delivered by

MONROE, J. Plaintiffs, who are husband and wife, sue Daniel E. Sweet, as owner, and Henry L. Sweet, as master, of the sternwheel steamboat "Olive," for damages, alleged to have been sustained by reason of the drowning, through the negligence of the defendants, upon the night of July 4th, 1898, of their minor daughter, Helen, a young girl of sixteen. The defendants deny that they were guilty of negligence, and allege that the death of the minor was brought about by her own imprudence.

It is beyond controversy that the plaintiffs reside upon the Bayou Queue de Tortue, twelve miles above the point at which it enters Mermentau river; that, reckoning from the same point, the town of Mermentau is situated about twelve miles up, and the town of Lake Arthur, upon a lake of that name, about six miles down, that river; that, upon the 4th of July, 1898, a young man named Valsin Stutes, with four young ladies, viz: his two sisters, Azelda and Elizabeth, Miss Amanda Aube, and Miss Helen LeBlanc, went, by skiff, from the LeBlanc residence to Lake Arthur, to participate in celebrating the day; that, at Lake Arthur, they met Adam Simon, who invited them to return, as his guests, as far as the mouth of the Bayou Queue de Tortue, on the steamboat Olive, which, at the close of the day, was to carry a number of excursionists from Lake Arthur back to the town of Mermentau, and that they accepted the invitation, and boarded the boat, by which their skiff was taken in tow; that, about ten o'clock that night, and on, or just before, reaching the mouth of the bayou, a "slow bell" was rung. Valsin Stutes got into the skiff, followed by his sister, Azelda, and Miss Aube, and then by Miss LeBlanc, and that, when Miss LeBlanc got in, the three young ladies were precipitated into the river, with the result that Miss LeBlanc was drowned.

With regard to other facts and circumstances, there is considerable conflict in the testimony. The theory propounded by the plaintiffs is,

that it was understood between Adam Simon and the captain of the boat, that Simon and his friends were to be transferred, upon reaching the mouth of the bayou, to their skiff, and that, as they were about reaching that point, the boat was slowed down and the party were notified to get into the skiff, the bow of which was held alongside the boat by Harrington, the fireman, and the stern, by Sweet, who was acting in the double capacity of master and engineer, but that the boat, which had been making seven miles an hour, was only slowed to about half speed, and that its continued movement, the agitation of the water, and the consequent tendency of the skiff to get under the "guards" of the boat, rendered such a mode of transfer exceedingly dangerous, especially at night, and that the officers of the boat ought to have known, whilst Miss LeBlanc, and some other members of the party, having never before been on a steamboat, were ignorant of, the danger. The theory of the defense, upon the other hand, is, that it was the intention of the officers of the boat to make a landing upon the river bank, upon the lower, or down stream, side of the mouth of the bayou, and that whistles had been blown, signal bells rung, and the boat slowed down, with that view, but that the young ladies, of their own accord, or, at the instance of their escorts, and without the knowledge of the officers, undertook to get into their skiff, in the manner, and with the result, as stated.

Plaintiffs' theory is supported by the following positive and affirmative testimony, which we recapitulate, in substance, to-wit: Adam Simon testifies that his friends, having come, by skiff, from their homes, on the Queue de Tortue, to the town of Lake Arthur, he met them at the latter place; that the "Olive," having brought a party of excursionists (the witness among them) from Mermentau, and being about to proceed further on Lake Arthur, he took his friends on board, and, whilst on board, asked the captain if he would take them, as the boat returned to Mermentau and put them, and him, off at the mouth of the bayou, informing the captain that they had their skiff, asking him to tow it to the mouth of the bayou, and stating that they would there get into the skiff, from the boat, and thus reach their homes; to all of which the captain gave his assent; that about ten o'clock that night, the party being on the boat, and the boat on the way to Mermentau, the pilot, or some one else connected with the boat, notified him that the mouth of the bayou was "right around the bend," and that he and his party had better get ready, and that he, accordingly, took the ladies down stairs, i. e., from the boiler, or cabin, deck, to the lower, or main deck, in order

that they might be ready to get off; that Valsin Stutes got into the skiff, which was alongside, and held it, and that Harrington, the fireman of the boat, also held the skiff, at the bow, whilst Sweet, the captain, held it at the stern, and that Harrington said "get in"; that he, the witness, then turned to speak to some one near him and did not observe how the ladies got into the skiff, but that he heard a noise and found that they had fallen into the river, and that he and the captain pulled Miss Aube out, and took her to the engine room, whilst Valsin got his sister out; that he then found that Miss LeBlanc was missing, and he went into the water and swam around searching for her, but without success; that, at the moment of the accident, the boat was in the middle of the river (which is about one hundred yards wide), immediately opposite the mouth of the bayou, with her bow pointed straight up the river, and, though the engines had stopped, was still in motion, and "was driving pretty fast, so that Miss Aube's dress was flying through the water, and they had to pull to get her into the boat." The witness further testifies that the boat made no landing at the mouth of the bayou, but that, when the search for Miss LeBlanc was abandoned, he and his friends went off in their skiff.

Valsin Stutes testifies that no one told him that it was time to go, but that (knowing it himself, as we understand his testimony) he got into the skiff to bail the water out; that Harrington unfastened the skiff and held it, by a chain, at the bow, whilst Sweet held the stern, and that Harrington, twice, told the ladies to get in; that his sister, Azelda, and Miss Aube got into the after part of the skiff and Miss LeBlanc into the forward part, and that he is unable to say how the accident happened, save that the skiff tilted and they went overboard; that Sweet and Simon assisted Miss Aube out, whilst he helped his sister; that the boat was opposite the mouth of the bayou, moving slowly, though the engines had been stopped; and that there were some waves, making the water a little rough.

Mrs. Simon, who was then Miss Azelda Stutes, testifies, that she and the others went down to get into the skiff, at the suggestion of Adam Simon, and that they found two men holding the skiff, one, (whom she identified as Harrington) by a chain attached to the bow, and the other, (whom she identified as Sweet, but only from information obtained afterwards) holding the stern, and that Harrington, twice, told them to get in; that Valsin was already in the skiff, and that she was the first of the young ladies to get in, and was followed by Miss Aube, and, then,

by Miss LeBlanc; and that, when the latter got in, the skiff tilted and they were precipitated into the water, from which she was taken by her brother and Simon, and Miss Aube, by Simon and another man. She testified that Miss LeBlanc was very heavy, and she gives it, as her opinion, that if Miss LeBlanc had gotten in easily they would not have been thrown out, though she also states that she and Miss Aube were standing and that there were some waves.

Miss Elizabeth Stutes testifies that she and the others went to the side of the boat, to get into the skiff, at the suggestion of Adam Simon, and that there was a man holding the bow of the skiff and another holding the stern, but she does not undertake to say who the men were. She further states that she was looking elsewhere and did not see who got into the skiff, or the order in which they got in; that her attention was attracted only when she heard them in the water, and that she did not see who took her sister and Miss Aube out.

The theory propounded by the defendants is supported by the following testimony, also given in substance, to-wit: Henry L. Sweet testifies that he was acting as both master and engineer of the "Olive"; that Simon had asked him to let his party off at Bayou Queue de Tortue, but had said nothing as to the manner of debarking, and that he is unable to say that he knew that they expected to get ashore in their skiff, but that he knew, because they told him, that they lived on bayou Queue de Tortue; that they did not take the skiff with them on the lake, but, on the return of the Olive to the town of Lake Arthur, and before starting to Mermentau, he had it made fast to the port side of the boat, and was aware that it was being towed; that he notified the pilot that there were some ladies to be "let off," at the mouth of the bayou, and, whilst he did not tell him, in words, to make a landing directly on the shore, it was his intention that such a landing should be made, on the point on the lower side of the bayou; that, a short distance below the point mentioned, three whistles were blown, which indicated that the boat was about to make a landing, and that, so far as he knows, the boat was proceeding in the ordinary way to make a landing, though he does not know how she was heading when the accident occurred; that he received a "slow bell" just before the accident, and shut off steam, in part, but that it is hard to tell whether the speed of the boat had been diminished, as a boat will run quite rapidly, from acquired momentum, for a full minute after steam is shut off; that he was still in the engine room when he heard the screams which indicated that the accident had hap-

pened, and that he, then, shut off steam, entirely, stopped and reversed his engine and ran out and caught hold of one of the ladies, at the rear end of the skiff, and that he was among the first to get there; that he did not shut off steam after he had rendered this assistance, but that he then ran and stopped his engine, which he had before reversed; and thereafter he does not seem to know very clearly what took place, as he is unable to tell how long he stayed in the engine room, or what became of the ladies who were taken out of the water, save that they, eventually, went off in their skiff, without his knowledge. The witness further states that he considers it part of the duty of the captain to see that passengers are safely landed, but that he usually has others to attend to that duty; that, on the night of the accident there were employed on the "Olive," besides himself, a pilot, a fireman, a negro cook, who also acted as deckhand, and two men, Maignaud and Hoffman, whom he had engaged to help him; that he notified Simon, about fifteen minutes in advance, that they were approaching the bayou; that the boat, at the time of the accident, was just below the mouth of the bayou; that the boiler is located forward and the engine aft, with about sixty feet between, and that the skiff, from which the ladies were thrown, was made fast a little forward of the middle of the boat. He states that the guards of the boat extend about four feet beyond the hull on each side, and are about twelve or fourteen inches above the surface of the water, and that, as a general thing, it would produce no effect, other than to lower the skiff in the water, to force it under the guard, but that if a person stepped into the skiff and it caught the guards it would throw the person out. He further testifies that it would have been no trouble to make a proper landing, and he also says that on the lower river it is quite customary to take people off and on by means of skiffs, and that it is not dangerous, "if they will only let the boat come to a standstill."

Louis H. Michon was the pilot of the Olive. He testifies that he was told by Captain Sweet, before leaving Lake Arthur to stop at the Queue de Tortue, as they had some ladies to let off; that he knew that if they had ladies to let off they had to make a landing; that, after leaving Lake Arthur, Simon came to the pilot house and asked him to stop, because he had ladies to take off, and that he replied that he would take no orders from him and that he had better go to the captain,—that it was no use to ask for a "slow bell," but that he did not tell Simon that he had already received orders from Sweet; that when

they came near the bayou he blew three whistles, for a landing, and that he would not have blown for a stop in the middle of the river; that passengers are frequently transferred in that way (i. e. from boat to skiff, in the river), but, in such cases, he gives one bell, for a stop; that the boat must always be brought to a standstill before the transfer is attempted; and that it is dangerous to attempt it otherwise. He further states, that, after blowing the whistle, he gave a "slow bell," so that he could bring the boat around, bow on, to the point below the mouth of the bayou, as it would be dangerous to make the landing without doing so; and that, just then, he heard a scream, to which he did not pay much attention, that the scream was, however, followed by cries of "stop her; back her; somebody overboard!" that he then rang the bell to stop and back, and that the engine, at once, stopped and backed, as the boat was moving, under the slow bell, at about two and a half miles an hour, and that he was unable to finish the landing and was obliged to let the boat drift ashore, below the mouth of the bayou; that he remained on the roof until the boat had drifted ashore and had come to a dead stop, and then went below and found Harrington in the fireroom, but did not see the young ladies in the water, nor did he see two men holding one of them in the water; and that, as between the statement, "one of the girls was still in the water, and two of the men were holding her, and I helped pull her on the boat," made by him, in giving testimony shortly after the accident, and the one which he now makes, he stands by his present statement, though made some two years later than the other because he has had time to think over it. He further testifies that, whilst he does not know which side the skiff was on, if it was on the left hand side, coming up, the side from which he heard the screams, and forward, it could have been pushed under the guards by reason of the turn which the boat was making, and that it was a dangerous place to enter the skiff; and that, if a person should get into it in such a position, the skiff would probably be pushed under the guards, and the person thrown out, either between the skiff and the boat, or on the outside of the skiff, but that the skiff could be kept out by a person in it. He further testifies that the young lady fell overboard about 150 yards below the mouth of the bayou, and that the Mermentau runs southwest, to the sea, but is within the ebb and flow of the tide.

Ed. Harrington was the fireman and testifies; that he was firing when the accident took place; that it is not true that he was holding

one end of the skiff and Captain Sweet the other when the young ladies got in; that he did not tell them to get in, or hear any one else do so, and that he did not know that they were going to get in; that he did not see them fall, but that, after they had fallen into the water, he helped to pull one of them aboard. He also testifies that, when the whistles were blown, he shut off the draft under the boiler and came out of the fireroom to see where the landing was to be made and to get ready for it,—handle the lines, etc.,—and that he was standing in front of the boiler when the accident occurred, the boat being near the middle of, and headed directly up, the stream, 200 or 250 yards below the mouth of the bayou, and moving at the rate of about three or four miles an hour—half speed—with the skiff about amidships, on the port side; and that, as they were rounding a bend, the skiff was pressed against the side of the boat.

John Wright testifies that he has known Harrington and Sweet since he was a child; that just before the accident he was standing on the boat, near the skiff, talking to Miss LeBlanc, and shook hands with her and said "good night," as she stepped into the skiff, but did not assist her in getting in; that the young man, Valsin, and the other two young ladies had gotten in, and that Miss LeBlanc then put her foot on the seat of the skiff and "slided into the river;" that she did not jump into the skiff heavily, but was stepping lightly and that the skiff went under the guards, and that "she just naturally slided;" that the boat was not running at the time, and that he does not know what caused the accident.

He further testifies that he saw no one holding the skiff, but that, just after the accident, he saw Harrington, near the head of the skiff, and Sweet standing in the middle of the boat, looking, as he supposed "for the girl," but that he did not see who pulled the young ladies out of the water; he also says that he saw Sweet coming from the engine room; that the accident occurred about five hundred feet below the mouth of the bayou; that the distance from the deck of the boat to the seat, upon which Miss LeBlanc stepped, was about eighteen inches; and that, prior to the accident, as he was talking to Miss LeBlanc, he was not noticing the people around him. There is some other testimony, most of it, including that of a witness named Cousins, of a purely negative character, which needs not be particularly commented on, the foregoing synopsis embracing all that we find necessary to the solution of the questions:

1. Did Miss LeBlanc attempt to board the skiff upon the invitation of the officers of the boat, or by reason of her reliance upon their offers of assistance, whether express or implied, or upon the faith of provision made by them with reference to such attempt?

2. Was the attempt dangerous, and were the precautions taken commensurate with the danger?

The irreconcilable conflict in the testimony given by the witnesses for plaintiffs and defendants, respectively, renders it necessary that the whole should be carefully analyzed with reference to the circumstances which led up to and surrounded this most lamentable affair, and with reference also to the relation which the several witnesses bear to the case, and to the litigants.

Considering first, the circumstances:

Valsin Stutes, accompanied by his two sisters and the other young ladies, had left their homes on the bayou to go to Lake Arthur in a skiff, which, being some sixteen or eighteen feet long, was quite large enough to have accommodated a larger party, and they expected to return by means of the same conveyance; in fact, so far as concerns the twelve miles which separate the mouth of the bayou from Miss LeBlanc's residence, it is not suggested that there was any other way for them to return, and, as a matter of fact, the survivors of the party, eventually returned in that way. Upon reaching Lake Arthur, they found that the "Olive" had brought down from Mermentau, a party of excursionists, and was going to make a trip out on the lake and, in the evening, return to Mermentau, passing the mouth of the bayou on which they lived. Upon the invitation of Simon, who was one of the excursionists, but who wished to return up the bayou with them, they boarded the boat, in order, no doubt, to enjoy the novelty, as some of them had never been on a steamboat before; to participate in the excursion on the lake; and to enjoy that mode of travel, with the company on board, as far, on their way home, as the mouth of the bayou,—nothing else being contemplated, however, but that, from the mouth of the bayou, they should make the remainder of the voyage as they had come, by skiff. All this, we think, was made known to Captain Sweet, when Simon asked him to take the party as passengers, and the probabilities strongly support the testimony of Simon to the effect that it was understood between him and Sweet that, when they reached the mouth of the bayou, they would be transferred from the boat directly into the skiff, which the boat had in tow, instead of being put ashore

only that they might, then, re-embark in the skiff. The former method of transfer is shown to be quite common, is less troublesome to both boat and passengers, and, when properly directed, is accompanied by but little, if any, more danger than the other.

Beyond this, we find that, when the accident occurred, the boat was near the middle of the river, with the bow pointed straight up that stream, and, as we conclude, opposite to the mouth of the bayou. It is true that, upon this point, the evidence conflicts, some of the witnesses stating that the boat was then below the mouth of the bayou, from 150 to 250 yards, but the physical fact, which is unquestioned, that, three days later, the body of the drowned girl, as also her umbrella, were found at the very mouth of the bayou, taken in connection with the fact that the boat commenced backing almost immediately after the accident, we consider conclusive; for, there is nothing in the record which would lead us to believe that the body would have drifted 150 or 200 yards against the current of the river, and still less to justify the belief that two objects, differing so entirely, in form and substance, as a human body and an umbrella, and sinking, in from forty to sixty feet of water, would drift that distance, up stream, and be found, at the expiration of three days, at the same spot; and we can well understand that witnesses composing an excursion party returning at 10 o'clock at night, from an all day, fourth of July, celebration, would be more likely to note the position of a boat from which such an accident had happened after the excitement had somewhat subsided than at the moment.

There is no doubt that the captain knew that a party, of four ladies and two men, were about to get off the boat, for he testifies that he notified Simon that they were approaching the mouth of the bayou.

It is equally beyond question that he considered it the duty of the captain to see his passengers safe ashore, though he states that some one else usually represented him in the discharge of that duty. It appears, however, that the "Olive," a stern wheel boat, about ninety feet long, was, that night, carrying some sixty passengers, and that the officers and crew consisted of the captain, who also filled the berth of engineer, a pilot, a fireman, a negro cook, and two men who are said to have placed their services, in case of need, at the disposal of the captain, the one, being Maignaud, the proprietor of a saloon in Mermentau, the other, Hoffman, occupation not shown, both of whom, however, had remained on the roof, near the pilot house, from the time the

boat left Lake Arthur, and had received no intimation that their services were needed to aid in the landing of passengers at the Queue de Tortue. It seems clear that the pilot could not have been expected to leave his wheel for that purpose, and it is not pretended that anything of the kind was expected of the cook, so that if such service was to be rendered, the captain and the engineer, both of whom were on the main deck, from which the passengers were to get off, were the men, and the only men, to render it. But, although quite a number of persons had assembled on the side of the boat to see the passengers get into their skiff, the captain testifies that he was in the engine room and knew nothing of it, and the fireman testifies that he was in front of the boiler, and was equally ignorant. Nevertheless, the captain was among the first to take hold of Miss Aube, having for his assistant, Adam Simon, who was standing beside the skiff when she fell into the water, and the fireman seems to have been about as promptly on the spot, to render the same kind of assistance, either to Miss Aube or to Miss Stutes; the captain, according to his version of the matter, coming from the engine room, thirty-five feet away, and having, first, stopped to shut off steam and reverse his engine, after the young ladies had fallen into the river, and the fireman having come from the bow of the boat, a distance equally great or greater. If our conclusion as to the place, in the river, at which the accident occurred be correct, the boat, at the moment of the accident, had already passed the point from which to head in to the shore for the purpose of making a landing, as she was then in the middle of the river, heading straight up stream, with her port side opposite the mouth of the bayou, whilst the point at which it is claimed that the landing was to have been made was the angle, constituting the lower shore of the bayou and the left, or west, bank of the river. The pilot claims that it was necessary to make something of a wide turn in order to effect the landing, and that it would have been dangerous to have done otherwise, though he was going up stream, with plenty of water, and a bluff bank to land against. Without undertaking to question this alleged necessity, we do not understand him to pretend that it would have been the proper thing to have passed the place of landing, and, having turned his boat, to have approached it from the upstream side. He says, also, that he had blown his whistle three times, which indicated that he intended to make a landing, and that he would not have blown it at all for a stop to let passengers off in the river; and it is no doubt true that he did blow his whistle, and, possibly, three times, but it is also true, as we think, that,

when the accident occurred, he had passed the landing place, and, though the boat had been slowed down, she was still in the middle of the river, with her bow pointing straight up stream, and her position gave no indication, whatever, that a landing was contemplated, or that anything else was to be done except slow down the boat.

Considering now, the opportunities which were afforded the different witnesses to obtain the information which they have given on the trial and their respective relations to the case and to the litigants, as also some further features of the testimony given by them.

The four who give the affirmative testimony, to the effect that Sweet and Harrington held the skiff whilst the young ladies got in, and that Harrington told them to get in, appear to be, entirely, without pecuniary interest, but, being actors, and directly concerned, in the matter of their transfer from the boat to the skiff, it seems likely that they should have been able to see better, and should have paid more attention to the arrangements by which that transfer was to be effected, and should be better informed concerning them, than bystanders, who took no such part, and had no such interest at stake. Of the witnesses on the other side, Sweet is one of the defendants, and Harrington, the other, is charged with having actively participated in carrying out the arrangements whereby a human life was lost, and, as a result, his employers, or former employers, are sought to be made liable for something over \$15,000. Michon, the pilot, gives no testimony concerning the holding of the skiff. It may be remarked, here, that Simon, together with several other witnesses, was under the impression that the engine had stopped entirely at the moment of the accident, and that, in testifying, he gave it, as his opinion, that the officers of the boat had done about as well as they could in the attempt to make the transfer, being unable to specify in what particular they were at fault. With regard to the testimony of Wright, it seems to us hardly likely, in view of the fact that he was so much engrossed in conversation with Miss LeBlanc, immediately before the accident, as not to observe other persons standing around him, and of the fact that, the instant after he had let go her hand, in saying good night, she and two other young ladies were precipitated into the river, and this witness stood there, as near, or nearer, to them than any one else, whilst they struggled for their lives, and yet, is unable to say who assisted either of them on to the boat, that he should be particularly relied on when he undertakes to say who was not present at the moment, or to testify, it being at night, and there

being a number of persons around him, that the captain appeared upon the scene from the engine room, rather than from any other place. His testimony, we think, is also open to criticism on other grounds. Being asked which of the officers he saw after the accident, he answers: "Captain Sweet" and the examination proceeds: "Q. Where was he? A. Standing on the boat, about the middle of the boat, when I saw him. Q. What was he doing? A. Looking around for the girl, I suppose. Q. He was in the middle of the boat? A. Yes, sir. Q. You mean the steam boat? A. Yes, sir; he was looking across the boat. Q. Did you see Harrington? A. Yes, sir. Q. Where was he? A. On the side of the boat. Q. Which side? A. On the Calcasieu side, where the girl was drowned. Q. Near the head of the skiff? A. Yes. Q. Which way did Captain Sweet come from, when you saw him cross the boat? A. From the engine room. Q. Engine room? A. Yes, sir. Q. How long was that after the accident? A. Just after. Q. Right afterwards? A. Yes. * * * Q. Did you see who pulled the girls out of the water? A. No, sir; I don't remember who pulled them out."

The witness had not stated that he saw Captain Sweet cross the boat, only that "he was looking across the boat," but he accepted the suggestion contained in the question which followed, and, after giving answers which fairly meant that, when he *first* saw Sweet, after the accident, that officer was "in the middle of the boat," looking across the boat, or around the boat, "for the girl," as he supposes, he undertakes to say that he saw him coming from the engine room. The testimony is irrational, and inconsistent with the facts. If the witness first saw Sweet in the middle of the boat, it was a mere guess, whether he had come from the engine room or elsewhere, but there was no time, or occasion, for him to have been in the middle of the boat, looking across for the girl. There was no doubt as to where "the girl" was and there is as little doubt that Sweet was among the first on the spot from which she had fallen, for he, and other witnesses, on both sides, swear that he was; so that, "right afterwards" (referring to the accident) Sweet was not looking across the boat, but was assisting in pulling another of his passengers out of the water, a part of the affair which entirely escaped the observation of the witness.

These circumstances, together with the difficulty which we encounter in endeavoring to understand why this party of two men and four young ladies, situated as they were, should have desired, or attempted, to leave the boat, upon which they had been traveling, without the

knowledge, or assistance, of any of its officers, or employes, added to the fact that the testimony, which we have recapitulated, is positive and affirmative, on the one side, and negative on the other, force us to the conclusion that the captain and the fireman of the boat were the persons who were in immediate charge of the matter of her transfer, from the boat to the skiff, when Miss LeBlanc lost her life. Undoubtedly, she might have been SAFELY transferred, and might still have survived, notwithstanding that the boat was in motion, and notwithstanding that she received no warning of the extreme danger which would result in case the edge of the skiff, when she stepped in, should be caught under the guards. But the evidence establishes, beyond question that, in making the transfer, under such conditions, she must, necessarily, have been subjected to danger; and it also establishes that, although the peril was one which ought to have been, and was, known to the officers of the boat, they gave her no warning, but held the skiff, into which she was invited, in such a way that, when she put her weight upon it, the side nearest the boat was caught under the guards, and she was precipitated into the water. There was, and could have been, no sufficient reason for making the transfer as it was made, since it is conceded that it was attended with a high degree of danger, from which it might have been relieved, in part, if not wholly, by waiting until the boat had stopped; in which case, too, the probability of effecting a rescue, would have been greater, since, with a boat moving at the rate of even three miles an hour, a person falling into the water, at night, may be out of sight as well as out of reach before assistance can be secured, whilst it might well be otherwise if the boat were stationary. We are of opinion, therefore, that the means provided by the officers of the "Olive," for effecting the transfer of their passenger, Miss LeBlanc, were not commensurate with the danger to which she was subjected, and we fail to find anything in her conduct to relieve the owner of the boat from liability for the consequences.

"Reduced to the simplest form, the rule may be stated to be that the carrier is bound to exercise the strictest diligence, in receiving a passenger, conveying him to his destination, and setting him down safely, that the means of conveyance employed and the circumstances of the case will permit." Am. & Eng. Enc. of Law (2nd Ed.), Vol. 5, p. 558; see also *Lehman vs. R. R. Co.*, 37 Ann. 707; *Turner vs. V. S. & P. R. R. Co.* *Id.* 648; *Summers vs. C. C. R. R. Co.*, 34 Ann. 145; *Penniston vs. R. R. Co.*, 34 Ann. 777.

This rule states the obligation of the contract entered into by the defendants when they undertook to carry Miss LeBlanc from Lake Arthur to the mouth of the Bayou Queue de Tortue. We know that the passenger was not set down safely at the place of destination, and the defendants have failed to show that it was through fault of hers, and not of theirs.

There is a broad difference, it may be remarked, between the obligation of a carrier, to a passenger, and his obligation to a third person, complaining of a tort; the burden of proof, in the latter case, save where otherwise provided by statute, resting upon the complainant, to establish both the injury and the negligence which caused it. Such were the cases of *Diekman vs. R. R. & S. Co.*, 40 Ann. 787, and some others, to which we have been referred by the counsel for the defendants. Whereas, it is sufficient for the passenger, suing on a contract for safe carriage to establish the contract and to show that he has not been safely set down at his destination, to throw the burden of explanation on the carrier. It is for the carrier, and not the passenger, to prove what negligence, and whose, prevented the fulfillment of the contractual obligation of the carrier.

Julieu vs. Captain and Owner Steamboat Wade Hampton, 27 Ann. 377.

Patton vs. Pickles, 50 Ann. 857.

Moses vs. R. R. Co., 39 Ann. 649.

The amount of damages which should be allowed in cases of this character always presents a question of difficulty. The evidence shows that the plaintiffs were put to an expense of fifty dollars, or more, in connection with the search for the remains of their daughter, and the burial; and, beyond that, they claim \$900, as the value to them, at the rate of \$15 per month, of the services of the deceased, from the day of her death for a period of five years; \$1000 as the value to them of the filial offices and attention of the deceased; \$5000 as the amount to which the deceased, herself, by reason of her suffering, was entitled at the moment of her death; and \$5000, as punitive damages.

The daughter whom the plaintiffs have lost was an active girl, full of life and spirits, and of great physical vigor, who assisted in the work which was required about their country home, and they might reasonably have expected a continuation of that assistance, and of the filial and kindly offices which the deceased, as an affectionate daughter, owed to her parents. The plaintiffs are also entitled to recover the amount

which the daughter was entitled to recover at the moment of her death. Without undertaking to attribute a specific amount to each of these elements of the claim presented, we are of opinion that a total of \$2500 should be allowed, and that the claim for punitive damages should be denied. There may be some doubt as to whether the suit should not have been brought by the husband, alone, but the question has not been raised and would have been of no practical importance, if it had been. We shall not, therefore, undertake to pass on it, but will give judgment in favor of both plaintiffs. As to the defendants, it appears that the boat belonged to Daniel E. Sweet and that Henry L. Sweet occupied the position of master and engineer. Under these circumstances, we find no reason for holding the latter liable.

For these reasons, it is ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that there now be judgment in favor of the plaintiffs, Theoville, and Leonore, LeBlanc, and against the defendant, Daniel F. Sweet, in the sum of \$2500 with interest, as prayed for, and costs in both courts. It is further ordered and adjudged that in other respects the demands of the plaintiffs be rejected.

Rehearing refused.

No. 13,810.

RENE F. CLERC VS. MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY.

SYLLABUS.

1. While common carriers are not absolute insurers of their passengers, it is an implied condition of railroad companies with each passenger, that the latter shall not be put in jeopardy of life or limb by any fault—even the slightest of the servants of the company. The negligence of a common carrier includes its negligence in all the departments of its undertaking.
2. The passenger is not relieved of all obligation as to his own safety, but, unlike the carrier, he need not exercise the highest degree of care. He is bound to exercise only ordinary care and prudence to preserve himself from injury.
3. The standard by which to determine whether or not an adult passenger has failed to exercise the proper degree of care, is whether a person of ordinary prudence in the same situation, and having the knowledge possessed by the passenger would have done, or omitted to have done, the alleged negligent act. The passenger has the right to rely confidently on

107	370
109	529
107	370
114	279

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the care and watchfulness of the carrier to make all things safe for his transportation, with its incidents.

4. A railroad company cannot be permitted to place a car on one of its tracks in the hands of parties who do not know or appreciate the danger of doing or not doing certain acts which it was the duty of the party having charge or control of the car, to know, and escape liability for his negligent acts on the ground that it was not under the control of its employees. It is responsible for the negligent acts of those in whose hands it permitted the car on its tracks to pass.
5. It is negligence on the part of a railroad company to place a freight car, with opening side doors, on a switch connecting with the main track, so near the junction that the door, when opened, would close the intervening space between the switch and the track. To leave open the door of a car so situated or to throw it open as a train is passing, is more than carelessness and passive negligence. It is an active violation of the company's contract, against which the passengers would have a right to anticipate full protection.
6. Where the arm of a passenger was projecting from the sill of a car window, and was injured by being struck by the open side door of a freight car of the defendant company, left at rest upon a switch connecting with the main track, and so near that the open door closed the interval between the switch and the track, it is a question to be determined from the evidence under all the circumstances of the case, whether this was negligence on the part of the passenger—barring recovery.

A PPEAL from the Civil District Court, Parish of Orleans.—
King, J.

Dart & Kernan, for Plaintiff, Appellee.

Denegre, Blair & Denegre, for Defendant, Appellant.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff prayed for judgment against the defendant company for twenty-five thousand dollars, referring to it as Morgan's Louisiana & Texas Railroad Company.

After alleging that it operated a line of steam railroad for the transportation of passengers and that he had purchased a ticket from the company and paid his fare, he averred that he was on the 3rd of August, 1900, a passenger on car No. 318 of said company en route from New Orleans to Morgan City. That just after the train to which his car was attached had passed Gretna station, and while he was seated in the car, he was suddenly struck on the right arm by an object which he afterwards learned was the door and the iron bolt or

fastening thereof attached to a refrigerator or freight car also the property of defendant company or being used by it and in its charge and care, custody and control, and lying on an adjacent track of the defendant company in close proximity to the track over which petitioner's train was moving or being carried.

That said blow bruised, crushed and fractured petitioner's right arm, causing him great pain and suffering; that he was attended temporarily by fellow passengers; that the train was stopped and petitioner was removed from said car to the Charity Hospital in New Orleans, where, on the same day about noon, petitioner's said arm was amputated at the elbow—the said fracture and injury being such that amputation was necessary.

That petitioner thereby lost forever the use of his right arm, reducing materially his capacity for making a living, besides mutilating and disfiguring his body. That at the time of said occurrence petitioner was a merchant in New Orleans, a member of the firm of Clerc Bros. & Co. in which firm he occupied the position of a traveling salesman, receiving in addition to his salary a share in the profits of said business. That his connection with said firm grew out of and was maintained chiefly by reason of his capacity as a traveling salesman, which occupation requires activity and physical ability to take care of one's self especially in riding and driving in day and night through the country parishes of Louisiana, where much of petitioner's time was necessarily spent. That the loss of his right arm increases the cost or expenditure of traveling and had reduced his earning capacity.

That petitioner lost seventy days of time from his business by reason of his said injury, during which period he was unable to earn his salary and, on the contrary, was laid up, invalidated and unable to work and enduring constant physical and mental suffering; that he incurred expenses for physicians and medicines, and that while he had not lost his employment his strength had been undermined, and his capacity to earn a living had been effected as his usefulness to his co-partners or other employers had been materially reduced by the loss of his arm as aforesaid.

That defendant company was responsible to petitioner for his mutilation, pain and suffering, losses and injuries, because—

1st. Petitioner was without fault or carelessness and contributed in no way to said injury. That he was a passenger on the said car, in

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charge of the said company, in a place which he was entitled to consider safe, and had no warning or caution of the impending accident. That petitioner was entitled to safe carriage and protection from injury from anything in, on, or near the defendant's track, in its custody and control, or operated by it, under its care or placed by it or permitted by it to be placed or to remain in a position where said thing could injure said defendant's passengers. That the car in which petitioner was seated and the car which caused the injury was the property of the defendant, or in its possession and operated and controlled by it; that the accident could not occur and would not have occurred but for the carelessness and gross negligence of the defendant or its servants, agents and employees, for whose acts it was responsible.

2nd. That the two cars in question were larger than usual and there was no room between the two tracks for said cars to pass each other, particularly if the said freight car had its door open or had anything projecting from the same. That the tracks at that point, namely the track on which petitioner's train was passing and the track upon which the freight car was lying, were constructed in violation of the rules of the company as to distance between centers of tracks and were, in any event, not placed sufficiently far from each other to provide against accidents of this kind.

3rd. That the freight car in question had been lying within the yard limits of said defendant company with its door open or unsecured in the position which caused the injury for some hours in full view of the defendant's employees and was seen by or should have been seen by said employees and by the engineer and employees in charge of the train; that it was gross negligence and carelessness on the part of said employees not to have seen said car or, having seen it, to have allowed it to remain in that position at a time when passenger trains were known to be approaching and passing, and it was gross negligence on the part of the engineer of the train to attempt to pass said obstruction under headway as he did.

That for the mutilation, dismemberment and disfigurement, his pain and sufferings, and his decreased ability to earn a living, petitioner assessed his damages at twenty-five thousand (\$25,000) dollars aforesaid.

In view of the premises, petitioner prayed that Morgan's Louisiana & Texas Railroad Company be cited and after due proceedings had

that there be judgment in petitioner's favor condemning said defendant company to pay petitioner the full sum of twenty-five thousand (\$25,000) dollars with legal interest from date of judgment, and for trial by jury and for costs and for all general and equitable relief.

The defendant, after stating that its real name was Morgan's Louisiana & Texas Railroad and Steamship Company, pleaded the general issue.

Further answering it specially denied that the accident referred to or intended to be referred to was due to any fault or negligence on its part or on the part of any of its officers, agents or employees, and it averred that said accident was contributed to by plaintiff's negligence in unnecessarily and carelessly exposing his person to injury by allowing his arm to protrude out of the window of the passenger coach in which he was riding.

OPINION.

There is no dispute between the parties as to the fact that, at the time of the accident set out in plaintiff's petition, he was a passenger seated near a window, in one of the coaches of a train of cars belonging to and operated by the defendant company. That while so seated, and the train being in motion, he was struck upon the arm by some object which injured him to such an extent as to necessitate its amputation. That the object which struck the plaintiff was either the door or a projecting hasp or bolt attached to the same of one of the side doors of a freight car belonging to the defendant company which was at rest upon a switch track also belonging to the defendant company, which connected with the main track upon which the train was moving. That this freight car had been placed by defendant's employees upon this switch the evening before the accident, at the point which it occupied at the moment the accident occurred, and that point was so near to the main track, that when the door of the freight car was wide open, with the hasp or bolt extended to its utmost limit, the hasp would strike the side of a passenger coach, as, in motion, it passed by. The defendant denies that the plaintiff was struck by the projection of the hasp or bolt of the door into the window of the passing passenger coach at the point where plaintiff was sitting. It concedes that the bolt struck the coach, but it contends that it did so at a point several inches below the sills of the row of passenger car windows, as was shown by a defined line upon that car showing its line of contact.

In the brief filed on its behalf it is said: "It is conclusively shown by the witnesses that it was not the handle bar or hasp which struck plaintiff. If any additional evidence on this point is desired it will be found in the evidence which the hasp itself recorded on the side of the passenger coach." Further on it is said: "Everything points to the conclusion that the door swung open or was shoved open as the train was passing, and that the hasp or bar folded back on its hinge and so projecting a very short distance beyond the door, came in contact with car No. 318, and made the scratch mark above described, while the outer edge or face of the heavy door passed near enough to the side of the coach to come in contact with plaintiff's arm, which must have projected out of the window." * * * The conclusion is irresistible that the edge of the door struck plaintiff's hand. It passed within two or three inches of the side of the car and the blood stain on the door is just where contact with an arm resting on the sill, but extending out of the window, would take place." The motive of the defendant in insisting that it was the door and not the hasp which struck the plaintiff, was that the form of the door would prevent its projecting inside the window sill and would place the point at which the blow was inflicted, outside of the line of the side of the passenger coach. That plaintiff was struck either by the door or the hasp of the door of the freight car is beyond question.

The defendant denies that the person who threw open the door of the freight car was an employee of the company. He maintains that if any employee had thrown the door open, it would have been in violation of his duty and the rules of the company. He urges that the freight car was loaded with moss and consigned to one Hepting, and had been turned over to Hepting for the unloading of the moss and the company was not responsible for Hepting's acts.

It will be well to refer to the law governing generally this class of cases before making special application of it to the case immediately before us. We think it is very generally recognized that, for the safety of their passengers, common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of their business.

While common carriers are not absolute insurers of passengers, yet as declared by this court in *Black vs. Carrollton R. R. Company*, 10 Ann. 38, "It is an implied condition of railroad companies with each

passenger, that the latter shall not be put in jeopardy of life, or limb, by any fault, even the slightest, of the servants of the company."

In *Grand Rapids & I. R. Co. vs. Boyd*, 65 Ind. 526, the court said: "A common carrier of passengers is not an insurer of the passengers' safety against all the accidents and vicissitudes of travel, but it is an insurer against all risks caused or increased by the negligence of the carrier where the passenger is not at fault. The negligence of a common carrier in carrying the passengers includes his negligence in all the departments of his undertaking, the condition of the road, the character of the machinery, the quality of the cars, the insufficiency of the equipments, the skill and conduct of the agents and employes, in everything indeed, necessary to the safety of the passenger when he himself is not at fault." While the carrier is held to very strict care, the passenger himself is not relieved of all obligation of taking care of his own safety, but, "unlike the carrier," he need not exercise the highest degree of care. He is bound to exercise only ordinary care and prudence to preserve himself from injury. *Fetter's Carrier of Passenger*," Sec. 128; *Mackoy vs. Railway Co.*, 18 Ted. 236. *Smith vs. Railway Co.*, 32 Minn. 1; 18 N. W. 827, *Keokuk North Line Packet Company vs. True*, 88 Ill. 608; *Boland vs. Railroad Co.*, 65 Cal. 626; 4 Pac. 672.

The standard by which to determine whether or not a normal adult passenger has failed to exercise the degree of care is, whether his conduct is that of a prudent, reasonable, man, in possession of his ordinary senses and capacities placed in his situation." (*Fetter*, Sec. 128, *Sims vs. Railway Co.*, 27 S. C. 268; 3 S. E. 301. It has been held that "whether or not the act of a person is negligent, depends upon whether or not a person of" ordinary prudence "would have done or omitted to do the same thing." *Galloway vs. Railway Company*, 87 Iowa, 458-54, N. W. 447. The test of the liability of one to a charge of contributory negligence is whether a prudent person, in the same situation, and having the knowledge possessed by the one in question, would do the alleged negligent act. *Texas & P. Ry. Co. vs. Best*, 66 Tex. 116; 18 S. W. 224. See also *Curtis vs. Railroad Co.*, 27 Wis. 158.

"The passenger on a railroad train has the right to confidently rely on the care and watchfulness of the carrier to make all things safe for his transportation with its necessary incidents. While passively submitting himself to the carrier's care during the journey * * *

and he is not to be deemed guilty of negligence, unless knowledge of a defect or peril is thrust upon him and he then fails to use ordinary care to avoid injury." this right has to be exercised within reasonable limits. It stops where the situation is such that the exercise of the right in a particular case would relieve him from what, under the circumstances of that cause would have thrown upon him the obligation of taking, affirmatively, legal care of himself in the premises. In the case of *Summers vs. Crescent City Railroad Co.* (34 Ann. 145), this court, referring to the defendant, said: "As a carrier of passengers, it is elementary that defendant's duty was to exercise diligence, skill, care and foresight to carry them safely. (*Penn. Co. vs. Roy*, 102 U. S. 451.)

It was bound to know that its passengers, in common with those on other street railways, were in the habit of riding with their arms resting on the window sills and projecting outside of the cars; that under the usual conditions of construction of parallel tracks in the city, this practice was free from danger of collision with passing cars, on their respective tracks; that the width between its own tracks at this curve was exceptionally narrow; that the car No. 4 used by it was exceptionally wide; that such car in running over that curve was liable to meet another car; that in such meeting they would, under conditions perfectly probable, pass each other so closely as if not to collide to come very near touching; that in such event a passenger in either car occupying the position shown to be very commonly occupied, would inevitably be injured. Knowing these things, a reasonable care for the safety of others would have dictated the duty of using precautions to avoid the danger." Quoting, the court said: "As well said by an able judge, 'When we are engaged in an act which the surrounding circumstances indicate may be dangerous to others, and when the event whose occurrence is necessary to make an act injurious, is one which we can readily see, may occur under the circumstances and unite with the act to commit the injury, we are culpable if we do not take all the care which prudent circumspection would suggest to avoid the injury.' *Fairbanks vs. Kerr*, 70 Penn. St. 86."

The court decreed the defendant guilty of "negligence," as defined by itself in its decision. It then proceeded to consider whether the plaintiff was guilty of *contributory negligence*, saying:

"The sole negligence charged is his act in sitting as he did with his arm resting on the window and his elbow projecting out of the car.

Applying the principles already enunciated to the facts stated, we are of the opinion that there is a complete want of causal connection between the act and the injury. * * * It seems to us manifest under the circumstances of this case that no ordinary circumstances or foresight would have suggested to the most cautious person situated as plaintiff was, the slightest probability of danger from the meeting of a car on a parallel track. Seeing a car approaching he would have been perfectly justified (according to all common experience) *in diverting his attention and resting in the perfect confidence* that it would pass without touching him."

If the car had jumped the track, and had thus collided with the exposed arm of plaintiff, a different question would be presented. *Quoad* such a contingency, the act of plaintiff might have been judicially negligent. A prudent man might well foresee the possibility of such an occurrence and might well be held to have taken upon himself the risk of such a peril. But, viewing the particular damage here suffered concretely, Mr. Wharton's question, "Was it in ordinary natural sequence from the negligence?" must be answered in the negative."

In *Spencer vs. Railroad Co.*, 17 Wis. 787, the court said: "It is probably the habit of every person while riding in the cars to rest the arm upon the base of the window. If the window is open it is liable to extend slightly outside. This, we suppose, is a common habit. There is always more or less space between the outside of the car and any structure erected by the side of the track, and must necessarily be so to accommodate the motion of the train. Passengers know this and regulate their conduct accordingly. They do not suppose that the agents and managers of the road suffer obstacles to be so placed as to barely miss the car while passing. And it seems to us almost absurd to hold that in every case, and under all circumstances, if the party injured had his arm the smallest fraction of an inch beyond the outside surface, he was wanting in order and prudence."

Coming now to the case before the court, we are of the opinion that the defendant company did not comply, as a common carrier, with its duty to the passengers on its moving train, when it placed or allowed the loaded freight car, with its wide doors and bolts, to be placed as it was, on the switch connecting with the track, on which it was, and in permitting that car, after it had been placed where it was, to go into the possession of a person other than one of its own employees to be by him unloaded. It was unjustifiable in the company to place one of its

cars, occupying as dangerous a place, in the hands of an irresponsible party. So far from escaping liability by reason of the fact that the car was in the possession and under the control of Hepting, that very fact itself was an act of imprudence, carelessness and negligence. A railroad company cannot be permitted to place a car on one of its tracks in the hands of parties who do not know or appreciate the danger of doing or not doing certain acts, which it was the duty of the party having control or charge of the car to know, and escape liability for his negligent acts on the ground that the car was not under its control, and it is responsible for the faults of those into whose hands it permitted the car to pass. This freight car was on the switch so near the junction that its door when opened closed the intervening space between the switch and the main track. To open the door of a car so placed, when a passenger train is passing, is more than carelessness and passive negligence. It is a positive, active violation of the company contract. The defendant company could not, with impunity, throw a door open across the intervening space, taking the chance of its not hitting some one sitting in the passing car. On the other hand the passengers in the car had the right to assume that they would be protected from any injury to themselves from the operation of any force thrown actively against them by parties for whom the company would be responsible. In this case it is not claimed that the plaintiff threw his hand or arm out of the car, and in so doing struck some object on the outside.

On defendant's theory of the case, the car on which the plaintiff was a passenger, was moving towards the door and the door was moving towards the car at the time of the accident, while plaintiff himself was passive. We do not think that the plaintiff by any act of his estopped himself from recovering damages for the injury.

What did the plaintiff do which has cut him off from his action? The defendant says if it was guilty of negligence, so also was the plaintiff guilty of negligence. But is this true? At the utmost, the plaintiff inadvertently or forgetfully permitted his elbow to project somewhat beyond the outer edge of the sill. If in point of fact the arm was projected, it does not appear how far beyond the sill it was so projected, nor for how long a time nor from what cause. It can scarcely be claimed that a passenger on a train should be constantly on the alert and on guard at every moment of his trip, to see that his arm does not pass a hair's breadth beyond the outer line of the sill, that he should watch every movement of his body lest, perchance, in turning or stoop-

ing, his arm should pass a little beyond limits. Such requirement as his hands would be utterly unreasonable. That a passenger might be guilty of negligence on some particular occasion by projecting his arm beyond the outer line of the car, so as to bar recovery of damages received as the result of that act, is beyond question true, but this barring of the remedy would depend upon the facts and circumstances of the case. Inadvertence, inattention or forgetfulness are not, *per se*, "negligence." The time, the cause, the place, all the circumstances connected with the inadvertence, the forgetfulness, the inattention, are to be considered before they can be held to be of character such, as by reason of them, another person should be screened from liability and protected from the effects of an established *tort*.

Unless the act itself in respect to which inadvertence or forgetfulness or inattention is charged to have been committed is negligence, the inadvertence or forgetfulness cannot be negligence.

What is negligence? And what is contributory negligence? This court has itself, in the case of Summers in the 34th Annual, given a definition of the word. Several other definitions given will be found in Fetter's Carrier of Passengers, Section 3. The definition of this court referred to, is as follows: "Judicial negligence is the inadvertent omission to do something which it would be the legal duty of a prudent and reasonable man guided upon these considerations which ordinarily regulate the conduct of human affairs, to do, or the inadvertently doing something which it would be the legal duty of a prudent and reasonable man not to do, such act or omission being on the part of a responsible human being, and being such as in ordinary natural sequence immediately results in the injury complained of."

"This definition, though perhaps redundant, includes unequivocally all essentials and excludes acts not properly within the domain of negligence. It excludes offenses or intentional wrongs. It excludes mere moral duties. It excludes irresponsible persons, of whom various classes are mentioned by Mr. Wharton. And it excludes all acts or omissions which, though they may be negligent, with reference to certain relations or contingencies, have no causal connection with the injury complained of."

Assuming that the plaintiff did in point of fact project his arm to some extent beyond the window sill of the window at which he was seated, was his doing so, under the circumstances in which this was

done, and in view of the exact situation, "negligence"? We think not. The company's road is not a new one; it has been in operation for years; the situation of its tracks and the constructions along its lines are well known. No accident is shown or asserted to have occurred upon it by reason of any passenger having projected his arm beyond the window sill, and there certainly would have been accidents had that fact of itself been attendant with danger, as it is a matter of common knowledge that passengers are constantly doing this with no injurious results. The plaintiff had no reason to anticipate danger of injury to himself or to any one else by permitting his arm to pass beyond the sill. It is not pretended that there ever had been or was anything on the line of the road which would have made it at all dangerous for plaintiff's arm to have rested *precisely where it was, had not the special circumstances arisen from and out of which this accident occurred.* They would not have occurred but for defendant's sudden negligence, and the plaintiff had no reason to anticipate, prepare for and guard against such negligence. If plaintiff had had reason to anticipate that which happened, a very different case would have been presented. Defendant's counsel urges that injury in the Summers case was one in which a street railway and not a steam railroad was the defendant. It may be, and doubtless is true, that the legal situation in a case of this kind, may be varied by the fact that the company involved is a railroad instead of a railway company. If there be a difference, we will give heed to, and act upon it when it is shown in any particular case, but we cannot arbitrarily declare that, as a matter of law, passengers in a railroad car are prohibited from projecting, to the least extent, their arms beyond the side of the coaches, while the fact is open to enquiry in the case of a street railway company. In the Summers case, the court said "that in determining what constitutes negligence, precisely the same rules must be applied to the acts of defendant charged with negligence as to the acts of plaintiff charged with contributory negligence."

We have repeatedly relieved defendants from the charge of negligence where the act done was one which the party committing it had no reasonable ground to know or believe or could not reasonably be held to foresee in the light of attending circumstances, and which he did not know or have reasonable grounds to know would carry with it injury as its natural and probable sequence.

Mere temporary inadvertence on the part of a plaintiff, under such conditions and in reference to a matter of that kind, would not be contributory negligence, barring recovery for damages. We deal with this matter not from the standpoint of comparative negligence, but from that of absence of negligence in its legal sense on the part of the plaintiff.

If the arm of the plaintiff projected beyond the window sill, as defendant says it did, it does not show how far it projected, or for how long a time it did so. It may have been there for only a second of time, in his act of moving or turning. In *Patton vs. Pickles*, 50 Ann. 864, referring to the relations between a common carrier and its passengers, we said "the contract between the parties is one which from time immemorial has imposed upon the obligor exceptionally severe obligations. Safe carriage is not merely an incident of the contract, but it is its very direct object." We do not think that a railroad company can, by its own act or that of one for whose acts it is responsible itself, injure one of its passengers, and then throw upon him the obligation of disproving contributory negligence. In such a case the carrier must establish affirmatively the acts on the part of the passenger which it claims bring him under the operation of the rule of contributory negligence, barring him from recovery of damages. (*Kennon vs. Vicksburg, Shreveport and Pacific R. R. Co.*, 51 Ann. 1604.) The views herein expressed are substantially held in *Summers vs. Crescent City R. R. Co.*; *Lampkin vs. McCormick*, 105 La. 417, and *Kird vs. The New Orleans and North Western R. R. Co.*, 105 La. 226. See *Chaffee vs. Railroad Co.*, 104 Mass.; *Hempenstall vs. Railroad Co.*, 82 Hun. 285; 31 N. Y. Supp. 479; *Archer vs. Railroad Co.*, 106 N. Y. 589; 13 N. E. 318; *Fetter's Carrier of Passengers*, Sections 130, 131 and 127.

We think the judgment is far too large an amount. It is hereby reduced and amended to seventy-five hundred dollars, and, as so amended and reduced, it is hereby affirmed.

No. 13,831.

**MRS. EMMA WETTA, WIDOW OF JAMES L. DYER, vs. THE NEW ORLEANS
& CARROLLTON RAILROAD COMPANY.**

SYLLABUS.

1. Plaintiff, after the defendant had failed to produce testimony, which plaintiff avers was taken in answer to interrogatories, assumed to supply the testimony in her own behalf which testimony defendant had (according to plaintiff's averment) taken in its behalf and which plaintiff contends is favorable to her cause.
2. After plaintiff had undertaken to have the witness examined under commission, continuances were obtained by plaintiff.
3. It was not made evident that the commission was executed, and, in consequence, the court holds that defendant cannot, under the circumstances of the case, be held bound for the failure to produce the return of the commission.
4. Instead of insisting upon the return of the commission, plaintiff herself sought to have the testimony taken and failed to show proper diligence in this attempt. She was without right to return to the act of omission charged in matter of this testimony and made it a ground to reinstate her suit.
5. Granting or refusing a commission is a matter within the discretion of the court of the first instance and unless arbitrarily granted or refused affords no ground to set aside a judgment of non-suit.

A PPEAL from the Civil District Court, Parish of Orleans.—
St. Paul, J.

Benjamin Rice Forman, Plaintiff, Appellant.

Dart & Kernan, for Defendant, Appellee.

The opinion of the court was delivered by

BREAUX, J. Plaintiff, on the 29th of October A. D. 1896, instituted suit against the defendant to recover damages for negligently causing the death of her husband, James L. Dyer.

The only witness, plaintiff avers, who was with her late husband at the time he met his death and whose testimony in consequence was material in establishing her claim, left the city and went to New Jersey. Plaintiff, on June 8th, 1899, on making required oath, obtained a commission to take his testimony.

Prior to that time, on the motion of the defendant, a commission had been issued to take the testimony of this witness, but plaintiff says,

when it was returned, defendant did not have it filed. On the 10th of May, 1899, plaintiff's counsel sued out a rule to compel the defendant to show cause why the commission and interrogatories, and the complete return of the commissioner, who executed the commission which had been issued to take the testimony of this witness, should not be filed. The rule was dismissed, reserving, however, to plaintiff the right to require the production of the commission and interrogatories by *subpoena duces tecum*.

At the beginning of the following term of court, plaintiff sued out a rule for *oyer* of the interrogatories and cross-interrogatories which was issued and made absolute.

Appellant urges that this was not complied with by defendant. On January 13th, 1899, on plaintiff's motion, defendant was ordered to show cause why the return should not be made of said interrogatories and cross-interrogatories as previously ordered.

On the 9th day of June, 1899, plaintiff, on the other hand, undertook to obtain the testimony of this witness, E. C. Schaeffer, and to that end sued out interrogatories to have him examined at his place of residence in New Jersey. The commission to take the testimony of the witness was made returnable on the first of October, 1899. Plaintiff was not more successful in this attempt than she had been in the attempt to compel the defendant to return the interrogatories and cross-interrogatories propounded to him into court.

On March 20th the case having been called for trial, on motion of Mr. Jones, her counsel, and for the reasons he assigned, the case was continued to the next jury term.

On June 12th, 1899, the case was called to be tried by a jury. The court said, as shown by the minutes, that after having heard counsel for plaintiff on his application for a continuance, a continuance was ordered to the next jury term.

The commission made returnable by order of the court on the first of October, as before stated, was not executed before the first of December following. On the sixth of that month, defendant was ordered to show cause why the depositions should not be read in evidence. The court, as made to appear by the minutes, said on the day that this motion was heard, that, on the 8th of December, 1899, after having heard objection of counsel for defendant to the date of the issuance of the commission it dismissed the rule to read the deposition in evidence on the trial of the case.

On December 12th, 1899, on the court's order, another commission was issued to take the testimony of this witness returnable in thirty days. Before that time had elapsed, in accordance with prior fixing, the case was called for trial. It was then that plaintiff moved for continuance (the last time) and sustained her application by oath setting forth in substance that she was informed that shortly after having brought suit the witness (Schaeffer) left the State of Louisiana and that she had great difficulty in finding where he was and had tried on several occasions to get his testimony and after the utmost diligence on the part of herself and her counsel, S. S. Jones, she succeeded in locating him on the first day of December, 1899. His testimony was taken, but on rule to show cause the motion to read the testimony on the trial was dismissed for informality. That in due time the commission would be returned and be presented to the court to be read.

Mr. Jones, of counsel, corroborated the affidavit of plaintiff for the continuance of the trial to another day.

The motion for a continuance was overruled, and on the 19th day of December, 1899, the plaintiff having waived the trial by jury, the court ordered a judgment of non-suit to be entered from which plaintiff appeals.

Plaintiff's first complaint is that defendant was at fault in not returning into court the depositions of the witness in question and that by defendant's conduct she (plaintiff) was influenced to believe that his depositions would be returned into court; that on the 9th of June, 1899, failing to get these depositions, she moved for a commission which was made returnable on the first of October.

It is quite true, as contended by plaintiff, she had the right to call upon the defendant to produce these depositions and had she insisted doubtless they would have been produced, or it would have been shown, we think, why they were not produced and a record would have been made up that would have presented all the facts in this connection.

Whether it was proper on the part of plaintiff to proceed as she did in the first place by rule or by motion for *oyer*, no longer presents an issue by reason of the fact that after the first rule—that is, the rule to compel defendant to produce the commission and its return had been dismissed, she, on motion for *oyer*, obtained needful order from the court to defendant to produce the commission. After this order had been granted, plaintiff chose again to move for an order alleging that

defendant had failed to comply with the court's order, and asking that defendant show cause on January 27th, 1899, why proper showing should not be made (to quote from the motion) "of the interrogatories and cross-interrogatories as ordered."

The entries in the minutes show that this last application was never tried. It was twice continued, the last time indefinitely. The result is that there is no evidence before us of an executed commission, Plaintiff, in argument, said that it had been executed, while defendant is equally as confident that it was not. The clerk in his certificate sets out that the commission and interrogatories are not in the record. Nothing is mentioned of missing return of the commission.

On March 20th, 1899, as before mentioned, the case itself was continued to another jury term, and in the time intervening between the two jury terms, plaintiff sued out a commission as before mentioned to take the deposition of this witness, Schaeffer. The commission was not returned within the time it was made returnable by the court.

She knew in June, 1899 (she alleges it), that the witness was in Newark, New Jersey. True, it is shown by affidavit, the verity of which we have no reason to question, that the witness refused to testify before he did testify, saying that he "was coming South," affiant says. But this, of itself, does not explain the delay in taking out another commission after the first had been illegally executed.

It must have been manifest to plaintiff that a commission executed thirty days after the return day was not legally executed, and was not admissible in evidence. Instead of immediately seeking to have another commission executed properly, plaintiff delayed in order to have a motion passed upon by the court which she should have known would not be sustained.

The case, filed in 1896, had been continued on motion of plaintiff from jury term to jury term. The court, we infer, had concluded that it had become proper to require more diligence than had been shown in order again to continue the case for a trial by jury. We are not of the opinion that the court erred. The Latin maxim may be changed so as to read that it is to the interest of the State that there be a limit to delays.

Continuances are largely left to the discretion of the court. C. P. 468; State *ex rel.* Isaacson vs. Judge, 34th Ann. 76. They will be cause for reversal only in extreme cases. Cameron vs. Lane, 36 Ann. 719. True, when one had exercised the utmost diligence and had not suc-

ceeded in securing evidence which was on its way by mail the court reversed the ruling which had resulted in refusing "a trifling necessary delay" to admit, as we infer, depositions timely taken. Succession of White, 45 Ann. 633.

We do not think that our case falls within the rule laid down in the last cited decision as the plaintiff had not made a showing of all possible diligence, as found by the court *a qua*. In this finding of the District Court, we have not discovered that there is error. The commission was made returnable a number of days after the day fixed for trial. So far as this may be urged as an objection, it meets with an easy answer, as will be shown by reference to the decision in *Schneider vs. Insurance Co.*, 32 Ann. 1049.

In another suit, if filed, plaintiff will have the opportunity to reassert all rights she may have.

The law and the evidence being with defendant, the judgment is affirmed.

No. 14,237.

D. W. HUDSON ET AL. VS. POLICE JURY OF CLAIBORNE PARISH.

SYLLABUS.

1. Taxpayers of a parish have the right to implead the Police Jury and call in question the legality or constitutionality of any act or ordinance of that body.
2. Act No. 24 of 1870, which prohibits Police Juries from making appropriations for, or authorizing expenditures upon, public roads until provision for meeting the same shall have been made by laying a *special tax* on all the real and personal property in the parish, and which declares that payment for work performed or material furnished for constructing or repairing roads shall not be made from any other fund or funds of the parish, is distinctly modified, if not repealed, by Art. 291 of the Constitution of 1898, which authorizes Police Juries to set aside at least one mill of the annual parish tax for roads and bridges.

A PPEAL from the Third Judicial District, Parish of Claiborne—
Edwards, J.

Richardson & Richardson, for Plaintiffs, Appellants.

James Edward Moore, and *J. C. Theus*, District Attorney, for Defendant, Appellee.

The opinion of the court was delivered by

BLANCHARD, J. Tax-payers of a parish have the right to implead the Police Jury and call in question the legality of any act or ordinance of that body.

That is what is done in this case.

In July 1901 the Police Jury of the Parish of Claiborne adopted an ordinance authorizing and providing for the purchase of a road machine, and other tools necessary for a road-making outfit, together with six mules, and for the hiring of a competent man to operate the machine on the roads.

It authorized a warrant to be drawn on the treasury for an amount sufficient to pay for the machine, outfit and mules, and for the necessary operating expenses. The amount was \$2300.00.

Plaintiffs attack the ordinance as illegal, *ultra vires* and void, and enjoin its execution.

Their contention is that only funds raised specially for that purpose can be expended by Police Juries on roads, and that the funds authorized in this instance to be warranted on are not funds specially raised for road purposes.

Their further contention is that the system of working the public roads by the appointment of road overseers and the calling out of hands subject to road duty having been theretofore adopted by the jury and being still in vogue, no other mode of working the roads can be resorted to until the repeal of the first.

They contend, further, that the jury may not levy a tax for a purpose not embraced in its annual budget of expenditures, and assert that the budgets for the years 1900 and 1901 contain no item calling for funds to be expended in the construction, repair and maintenance of roads.

Lastly, they claim that the jury have, by the ordinance referred to, contracted a debt without making provision for its payment, as the law requires under penalty of nullity.

We learn from defendant's answer and from the proof administered that there was, when the ordinance was adopted, and is now, in the general fund of the parish an amount in excess of the sum required to purchase the outfit and do the work contemplated by the ordinance, and that this amount was a surplus in the sense that it was not required for other parish expenses and had not been appropriated for other purposes.

We learn, further, that the budget of estimative parochial expendi-

tures for the year 1900 and that for 1901 contained, each, an item of \$2000.00 reading as follows:—"For bridge, lumber and road supplies."

The trial judge rejected plaintiffs' demand and dissolved the injunction. They appeal.

Ruling—It is not true as a matter of law that the system, so long in vogue, of working the public roads by the appointment of road overseers and the calling out of hands subject to road duty, is preclusive of other methods. It would be regrettable, indeed, if such were the case. The Police Juries in the respective parishes are compelled, in many, perhaps for the present in most instances, to adhere, from the force of circumstances, to the old system, but the demand of the times is for more progressive methods, and where it is possible to put these in operation it may be done, and this, too, without stopping to repeal the old ordinances providing for the appointment of road overseers and the allotment of road hands. It might be advisable, in some instances, to use in part the old system and adopt in part newer and better methods, and, therefore, not the part of wisdom to repeal the old.

It was entirely competent for the defendant jury to allot all of the \$2,000.00 itemized on the budget of 1900, and of the \$2,000.00 itemized on the budget of 1901, for "bridge, lumber and road supplies" to the purchase of a road-making and repairing outfit.

It is not shown by the plaintiffs that this money was not on hand, when the ordinance complained of was passed, or enough of it to pay the \$2,300.00 required under the ordinance. And it is not objectionable that part of the \$2,300.00 is to be used in operating the outfit on the roads.

There was a large surplus unused in the treasury and for aught to the contrary that is found in the record of the case, it may have arisen from the theretofore non-expenditure of the funds budgeted for road and bridge supplies in 1900 and 1901. The obvious meaning of "road supplies" as here used is that the money raised under that head was to be expended on the public roads. If tools or implements were needed they could be purchased and other expenses necessary to road-making and repair could likewise be paid.

Act No. 24 of 1870, which prohibits Police Juries from making appropriations for, or authorizing expenditures upon public roads until provision for meeting such appropriations or expenditures shall have been made by laying a *special* tax on all the real and personal prop-

erty in the parish, and which declares that payment for work performed or material furnished for constructing or repairing roads shall not be made from any other fund or funds of the parish, is distinctly modified, if not repealed, by Art. 291 of the Constitution of 1898, which authorizes Police Juries to set aside at least one mill of the annual parish tax for the purpose of constructing, maintaining and repairing the public roads and bridges. See *Logan vs. Parish of Ouachita*, 105 La. 500.

We fail to perceive why, under the authority of this Article, defendant jury could not make use of the surplus funds shown to be in its treasury to an amount sufficient to meet the expenditure authorized by the ordinance attacked.

By so doing the jury was but designating or setting aside for road improvement purposes that much of the parish tax that had been theretofore levied and collected, and it was doing this, too, without trenching upon means needed to meet other parochial expenses estimated for in the budget.

Nor is this a case where the Police Jury has contracted a debt without making provision for its payment. It made the best possible provision for its payment; it ordered the debt paid by warrant drawn on available cash in its treasury.

There is no merit in the demand of the plaintiffs, but we do not think this a case where they should be mulcted in damages on account of the injunction sued out, even to the extent of a sum for attorney's fees.

Judgment affirmed.

No. 13,988.

ALLEN J. PERKINS VS. FRAZER & NASON.

SYLLABUS.

1. A contractor who has unadvisedly refused to perform his contract may, while the situation of things is unchanged, retract the refusal, and go on with the contract; and is not cut off from so doing by the service upon him of a notice to the effect that the contractee will hold such refusal to be a default and will sue to dissolve the contract.
2. The facts being, as follows: that in March 1898 A and B entered into a contract by which A was to furnish irrigation water and B to make a rice crop and pay water rent; that B dehed owing any water rent for 1898, claiming

Perkins vs. Frazer & Nason.

that owing to the insufficiency of the water service the crop had suffered loss to an amount more than off-setting the water rent; that A did not press the payment of the rent, although B was well able to pay and could be made to pay; that in March 1899 the parties entered into another contract materially amending the contract of 1898, but making no allusion to the water rent for 1898; that thereafter A did not renew the claim for this water rent, not even when in February 1900 written demand was made for the payment of rent due, and presumably of all rent due; that the claim was renewed for the first time in defense to a suit by B to annul for non-performance of the contract in question,—held: this debt for rent of 1898 is presumed to have entered into the contract of 1899 as part of the consideration thereof, although not expressly mentioned in the instrument evidencing said contract. The modes of extinguishing obligations specified in Article 2130 of the Civil Code are not exclusive.

A PPEAL from the Fifteenth Judicial District, Parish of Calcasieu.—*Miller, J.*

Sompayrac & Toomer, for Plaintiff, Appellant.

Pujo & Moss, for Defendants, Appellees.

The opinion of the court was delivered by

PROVOSTY, J. In March, 1898, Nason, of the defendant firm, and Perkins, the plaintiff, made an agreement for the prolongation of Nason's irrigation canal easterly along the north boundary of Perkins' land. In March, 1899, the defendant firm, to which had passed all the rights and obligations of Nason under the said agreement, and the plaintiff made an agreement for the prolongation of the same canal southerly along the east boundary of the same land. The agreements contained reciprocal obligations: on the one part to construct the canal, and furnish water from year to year; on the other part to cultivate a specified number of acres in rice, and pay water rent from year to year. Plaintiff now sues to set aside these contracts on the ground of non-performance, and to recover damages; and defendant, in reconvention, claims the water rent for 1898 and 1899.

Defendants have aimed to carry out their contract, and, we think, have done so. True, they were somewhat tardy in beginning to furnish water to the crop of 1898, but this was owing to badness of weather, whereby work on the canal was impeded, and to slowness of machinery in coming to hand. From the time that water began to flow in the canal, say 25th of July, the supply was abundant. The crop had felt the need of water, but not to the extent of appreciably affecting results.

Had the plaintiff been prepared, as was his obligation under the express terms of the contract, to conduct the water and hold it in, all would have gone well. To a contractor starting a work of some magnitude a degree of indulgence is due—in our opinion defendants did not by their said tardiness exceed the measure. Indeed, in the petition, no specific complaint is made in connection with the water supply for 1898; the specifications are confined to the supply for the years of 1899 and 1900; they are, first, that in 1899 defendants failed to furnish to a certain part of the land enough water; and, second, that in 1900 defendants refused to furnish any water at all. The first specification is not borne out by the facts. Defendants were fully prepared to furnish all the water necessary for the crop of 1899, and they did so; if certain parts of the crop were cut short by drought, the cause must be sought for in the inadequacy of plaintiff's field levees, not in the inadequacy of the water supply. The refusal to furnish water for the crop of 1900 was retracted within a few days, and while the situation was still intact, and thereafter water was furnished and received as if the refusal had never taken place. The question whether defendants could thus retract their refusal is not, in our opinion, a difficult one. Plainly, so long as things are whole, a man who has rashly said he would not stand to his bargain may take back the word. Why not? No one is hurt, and the bargain is carried out. In the instant case the contractor was yet in time to perform the contract and the situation was unchanged. The demand for water, and the refusal, and the retraction of the refusal, took place early in the season when the crop could, without detriment, wait awhile for water.

On May 23rd plaintiff made the demand for water; on May 24th, next day, defendants refused—"unless you pay us the water rent due us for the crop of 1899;" on June 5th plaintiff notified defendants that he held this refusal to be a default on the contract, and that he would sue to set aside the contract; on June 9th defendants retracted the refusal. Under this state of facts the question comes up whether, by this notification of June 5th, plaintiff cut defendants off from the opportunity to retract the refusal. We think not. The contract was ^{high!} ~~not~~ ^{ended} ~~out at an end~~ ^{to} by the refusal, nor by the notice; it continued in full force and effect. Nothing short of a judgment, barring, of course, consent of parties, etc., could put an end to it. C. C. 2047. According to Demolombe (Traité des Contrats, T. 2, No. 517) and other commentators on the Articles of the Code Napoleon correspond-

ing with the Articles of our Code on the subject of the resolutive condition, and according even to Pothier, the real parent of the Code Napoleon, from which our Code is mainly derived, the contractor, after judgment, but pending suspensive appeal, is yet in time to perform his contract. Pothier, Vente p. 211, No. 476; Constitution de Rents, No. 229. The spirit of the law is against the enforcement of the resolutive condition, and in favor of the contract being carried out if possible. The Roman law, of which our own law of contracts is, so to speak, a mere continuation, did not recognize the implied resolutive condition in contracts having a name, such as a sale, partnership, etc. We are mindful that expressions are to be found in some of the decisions of this court to the effect that, after default, an offer to execute comes too late (Pratt vs. Craft, 20 Ann. 291), but these *dicta* are to be read in the light of the facts of the cases in deciding which they are made. Article 2047 expressly authorizes the court to permit the contract to be performed after default. (Turner vs. Collins, 14 Martin, 605. Now, under the circumstances of this case, no court on earth would have refused this permission to defendants, and hence by retracting the refusal and going on with the contract they merely anticipated what would have been the judgment of the court. Their refusal was unadvised, for they could not go on using the right of way and not furnish water, enjoy the benefits of the contract and reject its obligations; but plaintiff had refused to pay the water rent for 1899, and the refusal, therefore, though founded narrowly in law, was, beyond question, founded broadly in human nature, and it is certain that no court would have denied permission to take back this harmless and not unprovoked threat and go on with the contract.

Defendants having performed their contract, the two demands of the plaintiff must fail.

We are not to be understood as implying that by consenting to the water service, such as it was, plaintiff did not waive the right to sue in dissolution; nor that by the saving grace of protests plaintiff could, at the same time, occupy the antagonistic positions of repudiating the contract and receiving the water furnished in pursuance thereof; nor that after defaulting in his own obligation to pay the water rent of 1899, plaintiff was in a position to enforce the resolutive condition; nor that the failure of either party, in any one or more years, to comply with the continuing obligation on the one part to furnish water, and, on the other part, to make rice crops and pay water rent, would be ground for the resolution of that part of the contract by

which the canal was established and the lands of the neighborhood were converted into rice growing lands; nor that the contract of 1899 did not evidence a sale pure and simple of the right of way; all these questions are left untouched by us.

Defendants are entitled to judgment for the rents of 1899, fixed by the evidence at three hundred and ninety-six and 70-100 dollars, but not to the rents of 1898.

When the contract of 1899 was entered into, plaintiff was denying that he owed these rents of 1898. He was claiming that the debt had been more than offset by the losses to the crop of 1898 resulting from the inadequacy of the water service. We have stated above that he had some ground for complaint and that defendants had some need of indulgence. The contract of 1899 was to a great extent a readjustment of the contractual situation of the parties. Among other important changes it converted the original three years term into perpetuity; and the original obligation to deliver the water on the land into the obligation to deliver the water on the highest point of the land. To our mind it is clear that this contract liquidated the situation between the parties and made a fresh start. Thereafter, so far as the record shows, defendants made no further mention of this claim for rent, not even in the letter of the 24th of May, where they were making demand for the rents, and presumably for all the rents due. True the claim is not mentioned in the instrument evidencing the contract, but it was a matter at issue between the parties, and it is so improbable that the parties should have left this issue unsettled, dealing as they were with virtually the same subject matter, that we must assume that they considered it as settled by the contract. The debt, as it were, entered into the contract as a part of the consideration thereof. The modes of extinguishing obligations, enumerated in Article 2130 C. C., are not exclusive. *Bank vs. Cage*, 40 Ann. 138. This particular obligation became extinguished in a mode peculiar to itself.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be affirmed in so far as it rejects the demands of plaintiff and the claim of defendant for the rents of the year 1898, and be set aside in so far as it rejects the claim of defendant for the rent of 1899; and it is further ordered, adjudged and decreed, that the plaintiff pay to the defendant the sum of three hundred and ninety-six and 70-100 dollars, with five per cent. per annum interest from judicial demand; and that plaintiff pay the costs of both courts.

Rehearing refused.

Bagley vs. Bourque.

No. 14,235.

JOHN J. BAGLEY VS. OPHELIA BOURQUE.

107 305
111 416

SYLLABUS.

Where an act, purporting to be a sale of real estate, and a counter letter confirmatory of said act and according to the vendor the right to redeem the property within a time fixed, are annexed to, and made part of, a petition in which it is alleged that the transaction was intended merely to secure a loan, and it is not alleged that the money necessary to redeem the property was paid or tendered within the time allowed, or that the property was worth less at the date of the transaction than the amount received by the vendor, or that the vendor remained in possession, an exception of no cause of action is properly sustained to a demand that the vendor be decreed the owner of the property and restored to possession on payment of the amount received by him with interest.

A PPEAL from the seventeenth judicial district, parish of Vermilion.—*Gordy, Jr., J.*

Joseph O. Daspit and Clegg & Quintero, for plaintiff and appellant.

Broussard, Kitchell & Bailey, for defendant, appellee.

The opinion of the court was delivered by

MONROE, J. This is an appeal from a judgment dismissing plaintiff's suit on an exception of no cause of action.

The allegations of the petition are, substantially, as follows, to-wit: That on September 7th, 1897, Mrs. Elizabeth Cluney wife of Martin Bagley, in order to secure the payment by her of the sum of \$1000, conveyed to the Abbeville Building and Loan Association, Limited, four lots of ground in the town of Abbeville, and, for the same purpose, certain shares of stock in said company, to which she had subscribed, were pledged, but that said conveyance was intended by the parties thereto to operate only as a mortgage to the extent of the obligation of the said Mrs. Cluney resulting from her subscription to said stock. That petitioner acquired said property from said Mrs. Cluney by public act, of date February 4th, 1899, and, during the month of October of that year, borrowed \$500 from defendant, to secure the payment of which he transferred to defendant "the right of redeeming said lots in said association and the rights he had

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acquired in, and to the property * * * and that, in addition to the \$500, said Bourque agreed to pay the dues to said association, also the taxes, up to October, 1900, amounting to \$124.00, making in the aggregate, \$624.00 actually paid, or to be paid, out by said Bourque. And that, for the purpose of securing to the said Bourque the payment of said money, petitioner signed a contract, in the form of a sale, transferring to said Bourque the lots of ground, with the right of redeeming the same from the said mortgage of the Building and Loan Association. That the recitals of Bourque's deed are, that he paid petitioner \$856.80, while, in fact and in truth, the said Bourque paid only \$500.00 to your petitioner, and paid to the Abbeville Building & Loan Association, Limited, during the year 1900, \$110.00, and the taxes, \$14.50, and for these sums, your petitioner agreed to pay said Bourque the sum of \$856.80, all of which will more fully appear by the act of sale and counter letter * * * hereto annexed and made part hereof * * *; that said transaction * * * was never intended by either party to be a sale of property but was only intended to secure the loan made by said Bourque * * *; that the above lots are worth more than \$2,500.00;" that "your petitioner has notified, and did notify, said Bourque, before the expiration of one year, that he would repay the loan and redeem the property from the mortgage, as contemplated under these agreements. That, notwithstanding these facts, the said Bourque, without the authority of your petitioner, has caused the said Building & Loan Association to make out a quit claim deed, or act of sale, to said Bourque, cancelling the stock of your petitioner and thereby causing your petitioner loss of the dividends which were earned by the shares of stock that were, and should now be, in the name of your petitioner * * *; that said Bourque now claims the possession of these premises hereinbefore described and is seeking to collect, and is collecting, the revenues and rents thereof, which are legally the property of your petitioner. Petitioner shows that he has tendered the said Bourque the sum of \$1397.36, being more than the amount which would compensate the said Bourque for all expenses and expenditures on the said property, including the original loan made your petitioner and the sum paid the * * * Loan Association, together with interest thereon and is now willing to pay him the said amount upon the said Bourque's cancelling and annulling the aforesaid act or contract between Bourque and your petitioner * * *; that the contract between him and the

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said Bourque was a pignorative contract conveying to Bourque the right to be paid out of the proceeds of the property and that your petitioner is the real and legal owner of that property and is entitled to be restored to the possession and to be decreed the owner thereof upon payment to Bourque of a sum sufficient in amount "to satisfy the debt due to Bourque and his expenditures lawfully made; that he is entitled to a judgment against Bourque condemning him to pay the sum of \$400, which the unlawful and unwarranted acts of Bourque in cancelling and conveying the shares of stock of your petitioner in the Abbeville Building & Loan Association amount to, and that he is entitled to an accounting" for rents and revenues, etc. He prays to be decreed the owner of the property, which he describes, and put in possession and that the defendant be condemned to receive the amount tendered, less the amount claimed by the plaintiff, in full satisfaction of his claim," etc.

The notarial act witnessing the transaction between the plaintiff and defendant, annexed to and made part of the petition, contains the following recitals:

"Personally came and appeared, John J. Bagley who declared that for and in consideration of the price and sum, and on the conditions, hereinafter set forth and expressed, he has, and by these presents he does, grant, bargain, convey, sell, assign, transfer, set over and deliver, in full property, and with full guarantee against all troubles, debts, mortgages, evictions, donations, alienations, or other encumbrances whatsoever, and with full subrogation to all his rights and actions in warranty against any and all previous owners, unto Ophelias Bourque, here present, accepting, acquiring, and purchasing for himself, his heirs and assigns, and acknowledging delivery and possession thereof, the following described property, to-wit: Five shares of stock of the Abbeville Building & Loan Association * * * together with the payments and accumulations thereon. Also the right of redemption and all other rights of said vendor in, and to, four certain lots," etc. "To have and to hold the said above described property unto the said Ophelias Bourque, his heirs and assigns forever, from and after this date." Then follows a warranty of title, and the act proceeds; "This sale is made and accepted for and in consideration of \$856.80, cash, which the vendee has well and truly paid unto the said vendor and the receipt whereof is hereby acknowledged by said vendor, who, by these presents, grants full acquittance therefor to said vendee."

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Another act, of date, July 11th, 1901, witnesses the sale, in the form of a quit claim deed, from the association to Bourque and recites that on September 7th, 1897, Mrs. Cluney had sold three of the lots in question to said association for the sum of \$1,000.00, and, as an additional security for the repayment of said sum, had pledged all her rights and claim to the other of said lots; that, thereafter, she had sold all of said lots to John J. Bagley, "with right of redemption and all shares of stock pledged to said association" and that Bagley had sold said lots to Bourque "with full subrogation to all his rights of redemption;" and the act then proceeds to recite the conveyance of the property to Bourque for \$445.72 "cash money," being the amount necessary to liquidate the claim "of the association against the property, and the surrender of five shares of the stock of the association, * * * together with all payments and accumulations thereon."

The counter letter from Bourque to the plaintiff reads: "I the undersigned, Opehelias Bourque do, by these presents, promise to retrocede to John J. Bagley the same property bought by me from him this day as per act passed before Louis J. Bourges, a notary public of Vermilion parish, this 14th day of November, 1899, to-wit: Five shares of stock, * * * and also the right of redemption in and to the four lots of ground, being * * * I promise to retrocede to said J. J. Bagley, on or before November 1st, 1900, for the price and sum of \$856.80, provided this amount is paid in cash on or before said date with the taxes and insurance premium that may be due on said property."

These instruments, which are annexed to, and made part of, the petition, control the averments of the plaintiff as to their character and purpose, and show that the transaction between him and the defendant was a sale, with the right of redemption, in strict accordance with the provisions of the Code. C. C. 2567 *et seq.*; Soulie vs. Ransom, 29th Ann. 161; Bevans vs. Weil, 30 Ann. 185; Levy vs. Ward, 32 Ann. 784; Jackson vs. Lemle *et als.*, 35th Ann. 855; Henkel vs. Mix, Sheriff, *et als.*, 38th Ann. 271; Lawler & Huck vs. Cosgrove, 39 Ann. 488.

The only averment in the petition tending to show compliance with the condition contained in the counter letter is the following: "Your petitioner has notified, and did notify, said Bourque, before the expiration of one year, that he would repay the loan and redeem the property from the mortgage as contemplated under these agreements." This does not amount to an allegation that the money necessary to

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redeem the property was tendered within the year, and the fact alleged *i. e.*; that, within the year, the plaintiff notified the defendant that he would pay such amount at a date not fixed does not meet the requirements of the case. It is nowhere alleged that, at the date of the sale, the property was worth more than was paid for it, and the fact that it may be worth more at this time does not affect the question at issue. The act of sale contains defendant's specific acknowledgment of the delivery and possession of the property, and there is no conflict between this acknowledgment and the plaintiff's averments elsewhere in the petition. On the contrary, those averments convey the idea that the defendant went into possession and so remained. The authorities to which we are referred, and which hold that where the price appears to be wholly inadequate, and where the nominal, or putative, vendor remains in possession, the agreement will be regarded as a pignorative contract, have, therefore, no application.

Judgment affirmed.

No. 14,177.

107	399
d122	885

F. STAEHLE VS. SYDNEY LEOPOLD.

SYLLABUS.

ON MOTION TO DISMISS THE APPEAL ON THE GROUND OF ACQUIESCENCE IN THE JUDGMENT OF THE LOWER COURT.

Plaintiff and appellant reserved his right to prosecute his appeal in his receipt handed by him to the defendant for an amount received after judgment in part payment of his claim, in terms sufficiently plain.

The court overruled the motion to dismiss.

ON THE MERITS.

1. The acceptance of the lessee was not substantially different from the offer of the lessor.
2. The parties disagreed about the amount of the rent, and when in the end the tenant agreed to pay the amount as he understood to have been asked by plaintiff, there was no question raised regarding the amount of the respective instalments, the total of which instalments is the same whether as claimed by plaintiff or as accepted by defendant.
3. The evidence is conflicting, defendant swearing affirmatively and plaintiff stoutly denying. Between positive testimony regarding what was said or done at a particular time and negative testimony, the latter is generally con-

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sidered of less weight, when it becomes merely a question of correctness of things remembered to have occurred or been said, the facts and circumstances of the case not being such as to prevent the unjust operation of the rule. *Guesnard vs. Executor*, 33 Ann. 800; *Law of Evidence*, Jones, Vol. 3, p. 901.

4. Where an issue was not raised in the District Court on appeal a correction of the judgment will not be made.
5. The controversy is brought to an end by deciding in effect that plaintiff is the lessor of the defendant and that the latter owes rent as set forth in the decision.

A PPEAL from the Civil District Court, Parish of Orleans.—
Theard, J.

Felix J. Dreyfous and Solomon Wolff, for Plaintiff, Appellant.

E. Howard McCaleb, for Defendant, Appellee.

ON THE MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

BREAUX, J. Defendant and appellee moves to dismiss this appeal on the ground that, since the appeal was taken, the plaintiff and appellant has acquiesced in the judgment rendered by voluntarily executing it in receiving two hundred and fifty dollars rent for the premises leased for the month of October, 1901. The receipt which defendant pleads as evidence of acquiescence shows on its face that the amount on rent account paid by defendant was received by plaintiff without prejudice to his right in the suit. Plaintiff was not committed by accepting the amount, for which defendant accepted a receipt containing a reservation of a right to prosecute the appeal as before mentioned.

ON THE MERITS.

Plaintiff, a lessor under the statute number 52 of 1900, proceeded by motion to eject the defendant, lessee, from premises leased.

Defendant's contention is that he had proposed to the plaintiff to become the lessee of the premises for another year from the first of October, 1901, and that plaintiff accepted the proposal for a rental stated by him to which he, defendant, consented and that there was in consequence a contract of lease between them entitling him to remain in possession as tenant.

The issues are of fact principally. The evidence is quite conflicting.

The defendant and another person named in the lease had been joint lessees. In June and July of 1901, plaintiff took steps toward retaining the property in his own name as lessee. Defendant avers that he in company with his brother Arthur B. Leopold called on plaintiff regarding the lease of the property, and held conversations with plaintiff upon the subject. There was something said about re-leasing the premises. This plaintiff admits, but says that defendant declined to accept the offer he made in that connection.

Whilst being examined as a witness, plaintiff stated that defendant and his brother, Arthur B. Leopold, came to his place about the end of June, and stated that if he did not lower his rent, he, defendant, would not lease the house. His (plaintiff's) reply was that he would call upon them and let them know the amount of rental he would accept. In July following, he called upon them twice and informed them that he would let the house for the first six (winter) months for two hundred and fifty dollars, and the other six (summer) months for two hundred dollars. That they refused to accept.

It is evident that from the first defendant, assisted by his brother, sought to effect a lease for something less as rental than plaintiff was willing to accept. There is certainly difficulty in finding the true facts of the case. Plaintiff stoutly denies that defendant accepted his terms, while on the other hand these two, defendant and his brother, are equally as positive that they did meet him and that plaintiff offered to lease the property for an amount already stated to which they consented.

Plaintiff is corroborated to a great extent by two members of his family who deny some of the facts sworn to by the defendants. It is evident, in our view, that plaintiff offered to let the property to defendant, and that defendant sought to accept the offer as made by a letter addressed by him (defendant) to one of the attorneys of plaintiff dated July 31st, 1901, in which it is written "that some few days ago "Mr. Staehle offered to Sydney Leopold, and to his attorney, Arthur B. "Leopold, to renew the lease of the premises for a period of twelve "months from October 1st, 1901, to September 30th, 1902, which offer "has been this day accepted and Mr. Staehle notified in writing of said "acceptance." The preponderance of evidence, we think, shows that there was an acceptance as stated in this letter, and that Arthur B. Leopold referred to as having been present during a conversation with plaintiff, was present although this is denied by plaintiff.

But plaintiff, through his learned counsel, contends that the acceptance is not in precise keeping with the offer; that the offer was made to let the property at two hundred and fifty dollars for each of the six winter and two hundred dollars for each of the six summer months. The acceptance is two hundred and twenty-five dollars for each month of the twelve months. It will be observed that the total for the twelve months is the same in each case. That does not seem heretofore to have been the point of difference between the plaintiff and the defendant. Plaintiff having made the offer before mentioned, there is enough in the record to sustain the conclusion that the acceptance and one of the propositions of plaintiff are alike.

Before taking our leave of this case, we desire to state that we are not inclined to think that there was an attempt on the part of anyone to misrepresent. In the number of conversations had and at the different meetings of the parties and members of their families, there was enough said to sustain any imaginable theory of the case.

In arriving at a conclusion to affirmative testimony was given more weight than to negative testimony in accordance with the well established rule upon the subject. It may well be that witnesses whose testimony was negative in character were entirely sincere. On the other hand no such opinion can be formed if the positive testimony of defendant is not in accordance with the facts and statements made by them. Moreover the general rule of evidence is that affirmative testimony is stronger than negative. Law of Evidence, Jones, Vol 3, p. 901.

On the part of the defense it was said that should we find there was a contract between the parties the judgment must be amended; that the prayer for general relief by both parties and the evidence admitted without objection warrants the court in decreeing that a contract of lease exists between the parties in keeping with the letter of acceptance written by defendants.

We have already stated that a contract of lease exists, but under the pleadings and the issues we do not think that we should, *ultra petendum*, decree that the judgment heretofore rendered is in part erroneous and that it should be amended.

For reasons assigned, the judgment appealed from is affirmed.

No. 14,110.

FRANK J. PULFORD, TUTOR, vs. FRANK DIMMICK ET ALS.

SYLLABUS.

1. In the contract of sale it is essential that the price be certain—fixed and determined between the parties.
2. So, too, a fixed price is of the essence of the contract of *dation en paiement*.
3. While the validity of a sale or *dation* does not depend on a price being fixed with certainty *in the act*, it does depend on a certain price having been agreed upon by the parties, or left to the arbitration of a third person who fixes it.
4. And a transfer in writing of real estate, attacked, must be held null, either as a sale or a *dation*, if it be not shown that it was made for a price that was agreed on.
5. While it is true that the rules peculiar to donations *inter vivos* do not apply to *remunerative* donations, this is not without exception. For instance, where the value of the object given exceeds by one-half the amount of the charges, or the value of the services, it is necessary the act of donation should, like gratuitous donations, be passed before a notary and two witnesses.

Judgment appealed from amended and affirmed.

A PPEAL from the Sixteenth Judicial District, Parish of St. Landry—*Lewis, J.*

Lewis & Lewis, for Plaintiff, Appellee.

Kenneth Baillio, for Defendants, Appellants.

The opinion of the court was delivered by

BLANCHARD, J. Plaintiff is the grand-child and forced heir of Addison Dimmick, deceased, and sues through his tutor to avoid the transfer made by the said Dimmick to his son Frank Dimmick of the undivided one-fourth interest in and to the Bellevue plantation in Saint Landry Parish, together with a like interest in the live stock on the plantation.

Addison Dimmick died in December 1899. His wife, Levisa, died in October preceding.

The property left by the old people was all community in character. There were but few debts, which were, later, satisfied out of the proceeds of the succession sale of the movable effects.

The heirs of the decedents are:—

Coos Dimmick, a predeceased son, who left four minor children; Stella Dimmick, a daughter, who married Frank J. Pulford and died leaving a minor child—the present plaintiff; Maude Dimmick, another daughter, who is the wife of M. J. McDowell; Carrie Dimmick, another daughter, widow of Wilson M. Price; Malvern Dimmick; W. D. Dimmick, who died leaving two minor children, but who are now of age; and Frank Dimmick, the principal defendant herein.

The object of the suit is to have the property conveyed to Frank Dimmick brought back into the Succession of Addison Dimmick and wife and partitioned among the heirs according to law.

The grounds of the attack are:—

1st. That though the transfer purports to be a sale, no fixed price in money is named, and while the consideration is averred to be services rendered to the vendor by the vendee, no money value of such services is stated, to stand as the price of the sale.

2nd. That the transfer, if treated as a donation, is null because not executed before a notary and two witnesses.

3rd. That, if looked upon as a giving in payment, it is invalid because not clothed in the form required for that species of contract.

4th. That, taken in connection with the will of Addison Dimmick (which bequeathed one-third of his estate to Frank Dimmick), the transfer should be avoided because the consideration mentioned in the will and that in the transfer are the same, both being for services rendered the testator and transferror.

5th. That, if intended as a donation, the transfer is null because in excess of the legitimate portion which the father could give to the son.

The judgment of the trial court annulled the transfer on the ground (1) that, considered as a sale, the act is void for want of a fixed price in money—holding that neither on the fourth interest of the plantation and stock, nor on the personal services of the vendee, was any valuation in money placed by the act itself, nor was it proven on the trial that a valuation had been agreed upon by the parties, and that construing the sale and the bequest of the will together, and giving effect to both, would result in Frank Dimmick being compensated twice for the same services rendered his father; (2) that, considered as a donation, the act of transfer exceeded the disposable portion, which Frank Dimmick had already obtained by the bequest of the will.

From this judgment Frank Dimmick appeals. None of the other defendants, his co-heirs, save the minors, have any interest—the major heirs having sold their interests out to him.

Appellant repudiates any intention of claiming that the act of transfer attacked was a donation pure and simple, and avers that the objections leveled at it by plaintiff as such are supererogatory.

What he does contend is that whether the act be regarded as a sale, or as a giving in payment, or as a remunerative donation, it is valid because the existence of a full and adequate consideration has been established.

Ruling—On the 8th of February 1894, nearly six years before his death, Addison Dimmick executed a last will and testament wherein he bequeathed to Frank Dimmick one-third of his estate as an extra portion. This bequest, the will recites, was made to him because of the services he had rendered the testator and because of obligations imposed upon him by the will.

Frank Dimmick was named as testamentary executor without security and with seizin.

The Succession of Addison Dimmick was opened, the will probated, and Frank Dimmick qualified as executor.

The Succession of Levisa Dimmick, predeceased wife of Addison Dimmick, was opened and Frank Dimmick became its administrator.

The transfer made to Frank Dimmick, which is the object of this attack, was executed February 28, 1898—four years after the date of the will and something less than two years before the death of Addison Dimmick.

Frank Dimmick claims the bequest under the will, and claims, also, under the transfer.

His claims in this regard appear to have been acquiesced in by all the heirs, save the plaintiff and the minor heirs of Coos Dimmick, deceased.

In the contract of sale it is essential that the price be certain—fixed and determined between the parties. C. C. 1764, 2439, 2464; Wise vs. Guthrie, 11 La. Ann. 91; Prude vs. Morris, 38 La. Ann. 767.

While the validity of a sale does not depend on a price being fixed with certainty in the act, it does depend on a certain price being agreed upon by the parties, or left to the arbitration of a third person who fixes it. Walker vs. Fort, 3 La. 583.

And a transfer in writing of real estate, if attacked, must be held

null as a sale if it is not shown that it is made for a price that was fixed and agreed upon. So, too, a fixed price is of the essence of the contract of *dation en paiement*. Kleinpeter, Admr., vs. Harrigan, 31 La. Ann. 196; Barremore's Syndic vs. Bradford's Heirs, 10 La. 151; C. C. 2655, 2659.

The act evidencing the transfer attacked recites that the consideration of the sale is "the ten years and eight months services and labor rendered to the vendor from July 1866 (should be 1886, as the evidence shows) to February 28, 1898"—the date of the transfer.

The act, itself, fixes no price upon the property purported to be sold, nor money value upon the ten years and eight months services rendered, to stand as the price of the property.

An effort was made by the defendant to establish by parol testimony that the parties had agreed at the time of the transfer upon a sum of money due by the vendor to the vendee which was fixed upon as the price of the sale.

On the direct examination of Frank Dimmick, as a witness in his own behalf, he stated that the consideration of the transfer to him was the services he had rendered his father from *the date of the will to the date of the act of transfer*, at the rate of \$600.00 per year, and that this was so understood at the time by himself and his father.

This testimony was admitted, in one place, over the objection of the plaintiff, as appears by one bill of exceptions, and ruled out on objection, in another place, as appears by another bill.

It serves the purpose of showing that the defendant, himself, *at that time* considered that the bequest of the will had compensated him for all services prior to its date, as is the contention of the plaintiff.

It is true, in subsequent parts of his testimony he seems to have changed about and made statements to the effect that it was for his services from 1886 to February 1898—that the act of transfer to him in the latter year was executed, and endeavored, in that connection, to make the point, and to establish, that the bequest of the will was intended to requite him for services *other* than those referred to in the act of transfer. But this was, evidently, an afterthought intended to obviate the damaging effect of the first statement.

We must hold him to the statement first referred to, viz:—that the act of transfer had for consideration the four years and two months services, from the date of the will to the date of the act of transfer.

This is entirely inconsistent with the act itself which is plain and

unambiguous in the respect that the consideration was for "the ten years and eight months services from July 7, 1886, to Feby. 28, 1898," without stating what amount, or that any amount, had been agreed upon as *the value* of such services, to serve as the price of the sale, or the giving in payment.

We must further hold, in view of the said statement, that the subsequent testimony of the defendant that he and his father had figured up the services he had rendered from 1886 to 1898 at \$6,400.00, and that the same was fixed upon at the time as the price of the transfer, cannot be given any effect. It was a mere "card house" built up to be knocked down. Defendant cannot "blow hot and cold" at the same time.

When he says, in one breath, that he and his father agreed at the time of the conveyance of the property that the consideration of the transfer was what was due him for services from the date of the will only, at the rate of \$600.00 per year, and in another breath declares that he and his father, at the time of the transfer, agreed that the consideration was \$6,400.00 arrived at by figuring \$600.00 per year for ten years and eight months, we are forced to the conclusion, in view of the fact that his is the only testimony found in the record touching the matter of price, that no amount was fixed and determined upon by the parties as the consideration of the sale. The two statements are so conflicting and contradictory that effect can be given to neither.

This being so, the act can be sustained neither as a sale nor as a giving in payment. The prëexisting debt for services rendered, due by Addison Dimmick to his son, would, however, have supported this transfer or sale (*Levert, Burguières & Co. vs. Hebert*, 51 La. Ann. 226) had the parties fixed the amount thus due, and agreed upon the same as the price of the sale.

The will of Addison Dimmick executed on February 8, 1894, was intended, it must be held, to requite Frank Dimmick in full for the services he had rendered the old people on the plantation up to that date. So that when it is considered he would be receiving double pay for such services were the act of transfer of February 1898 held valid, it seems probable that Addison Dimmick really intended the conveyance of the fourth interest in the plantation and live stock to take the place of the will. But the will was probated by Frank Dimmick and he claims under it. Neither is the validity of its bequest to him contested. This but serves to accentuate the justice and reasonableness of the ruling which prevents him from taking under both for the same services rendered his father.

An additional consideration for the bequest to Frank Dimmick contained in the will was stated to be the fulfillment of the obligations imposed upon him by the will.

This obligation was in these words:—

He shall support my widow (if I die before my wife) in the same style of living as I have done.

But the wife did not outlive the husband, and, therefore, Frank Dimmick was never called upon to discharge the obligation.

This, however, did not militate against his right to take in full under the will and he has done so.

Besides, there was no occasion for the testator imposing the condition upon the donee son that he should support his mother. The old man, evidently, in making the will was treating all the property comprising his estate as belonging to him entirely, whereas, in point of fact, it was community property, burdened with few or no debts, and the half belonged to the wife.

She was, therefore, in the event of the husband's death, possessed in her own right, of an estate ample for her support.

The contention of defendant that if the transfer cannot be maintained as a sale or giving in payment, it should be as a remunerative donation, is also without merit.

The law relative to donations *inter vivos* is that the same must be evidenced by acts passed before a notary and two witnesses.

The transfer made to Frank Dimmick was not such an act.

But the point is made that the rules peculiar to donations *inter vivos* do not apply to remunerative donations, and C. C. 1526 supports this view, but adds:—

except when the value of the object given exceeds by one-half that of the charges or of the services.

Applied to the case at bar the meaning of the words quoted is that if the object given exceeded in value by as much as one-half the amount which was due Frank Dimmick at that date for services rendered, the donation, *remunerative* though it be, must conform to the rules applicable to gratuitous donations—must be evidenced by act passed before a notary and two witnesses.

The value of the fourth interest in the plantation and live stock sought to be conveyed exceeded by one-half what was due Frank Dimmick.

The amount due him was \$2,400.00.

Having requited him by the bequest of the will for all services rendered prior to its date, February 8, 1894, Addison Dimmick made a contract with him the same day to continue his services on the plantation, for the future, at a compensation of \$600.00 per year, to begin January 1, 1894. This contract was reduced to writing.

When the act of transfer was passed on February 28, 1898, there was due under the contract of hiring four years' salary, to-wit:—for 1894, 1895, 1896 and 1897—\$2,400.00. No part of the salary for 1898 was then due; but if any, only for two months, or \$100.00, which would make, at the most, \$2,500.00 due as salary to Frank Dimmick when the act was executed.

Now the value of the plantation and live stock was \$20,000.00. This is admitted in defendant's supplemental brief, where, arguing on this point, he takes as the criterion of its value what it brought at the succession sale, and says it (the plantation and stock) brought in round numbers \$20,000.00.

One-quarter of this is \$5000.00—a sum exceeding by one-half the \$2400.00 due Frank Dimmick in the way of salary or wages when the transfer was passed.

This being the case, to hold good as a remunerative donation, this transfer must needs have been executed before a notary and two witnesses.

The answer of the defendant claims in reconvention, in the alternative, should the act of transfer be annulled, the value of his services from 1887 to 1899, inclusive, at the rate of \$600.00 per year.

The will executed in February 1894 compensated him for all services up to January 1st, 1894. He has no just claim beyond that date.

Beginning with 1894, there was, as we have seen, an agreement in writing between himself and father that he should have a salary of \$600.00 per year for the services and labor to be rendered by him thereafter on the plantation.

The two old people died at the close of the year 1899. Frank Dimmick's just claim for salary, therefore, is from 1894 to 1899, both inclusive. This is six years and the aggregate of salary is \$3,600.00.

Against it, however, on the invocation of plaintiff, the trial Judge sustained the plea of prescription of three years so far as applicable, and since the reconventional demand was filed October 11, 1900, he held the plea applicable to all demands for overseer's salary prior to that date.

This was error. If the act of transfer of February 1898 served no other purpose it sufficed, along with the written agreement as to salary, as an acknowledgment of indebtedness sufficient to interrupt prescription, and to take out of prescription whatever portion, if any, of the salary due Frank Dimmick, from January 1, 1894, to the date of the transfer, was then subject to the plea. Besides, it would seem that grounds exist here for the application of the maxim "*contra non valentem agere nulla currit praescriptio*."

We hold, therefore, that Frank Dimmick is entitled to recover the sum of \$3,600.00 as salary due him from January 1, 1894, to the end of the year 1899, and that this amount is to be paid him out of the property constituting the estate of Addison Dimmick and his wife, Levisa.

It was a community debt.

For the reasons assigned, it is ordered, adjudged and decreed that the judgment appealed from be amended by increasing the amount therein awarded Frank Dimmick, on his reconventional demand, from Thirteen Hundred and one and 66-100 dollars, with legal interest from October 11, 1900, to Three Thousand six hundred dollars, with legal interest thereon from October 11, 1900, and as thus amended the said judgment be affirmed—costs of appeal to be borne by plaintiff and appellee.

No. 14,267.

CHARLES D. BOIN VS. TOWN OF JENNINGS.

SYLLABUS.

The question of the legality and constitutionality of a municipal ordinance, in the nature of a police regulation enforceable by fine and imprisonment, should be left to the court in, and to the occasion upon, which the attempt is made to enforce it, the remedy by appeal to this court being, in such case, open to the party as against whom the attempt is made. An injunction to restrain the enforcement of such an ordinance will not lie.

A PPEAL from the fifteenth judicial district, parish of Calcasieu
—Miller, J.

Fournet & Fournet, for plaintiff, appellant.

Cline & Cline, for defendant, appellee.

The opinion of the court was delivered by

MONROE, J. The plaintiff filed this suit upon September 13, 1901, alleging that he was, and had been, keeping a barroom in the town of Jennings, that he had paid his federal, state, and parish licenses for the year, and that he was in no way contravening any lawful ordinance, but that the town authorities had threatened him with arrest, fine, and imprisonment, unless he closed his establishment. He further alleged that he had already sustained damage, and that, unless the town was prohibited from continuing in its unlawful course, he would be irreparably injured. He, therefore, prayed for an injunction to protect him in his occupation, and for judgment perpetuating the same and awarding him damages and costs; and a preliminary injunction was issued, as prayed for, prohibiting the town of Jennings from hindering and obstructing plaintiff in the carrying on of his business "of a barroom." The defendant excepted to the jurisdiction of the court and also excepted that the petition disclosed no right, or cause, of action, and, for answer, denied generally the plaintiff's averments and alleged that the injunction had been wrongfully sued out in order to obstruct the municipality in the enforcement of its valid ordinance and to enable the plaintiff to conduct an illegal business, and it further alleged that it had been prevented by the issuance of said injunction from collecting fines for violation of such ordinance to the amount of \$100 a day and had been damaged to the extent of \$250 in the matter of attorney's fees. It, therefore, prayed that the injunction be dissolved, the suit dismissed, and the plaintiff condemned to pay \$5100 as actual, and a like amount as punitory, damages. The judge *a quo* referred the exceptions to the merits, but, after trial on the merits, declined to maintain jurisdiction, and dissolved the injunction, allowing the defendant the attorney's fee which it had asked, and costs, but he failed to make any disposition of the main action. The defendant has answered the appeal and prays that the judgment appealed from be amended in that particular and also by increasing the amount awarded against the plaintiff as damages. The facts disclosed by the evidence are, practically, the same as those in the case of Donat Pucheu vs. Town of Jennings, this day decided, with one important difference, which will be mentioned a little later. The plaintiff had paid his license, as alleged, and was engaged in keeping a barroom in the town of Jennings. It is not claimed that the business was a nuisance *per se*, or by reason of the manner in which it

was conducted, but, on July 9, 1901, the mayor and aldermen, pursuant to the power conferred, by paragraph 26, Sec. 15 of Act 136 of 1898, upon municipalities exercising their functions under the authority of said Act, adopted an ordinance to take effect August 15th, prohibiting the selling or giving away of spiritous liquors within the corporate limits of the town, under penalty of fine, or imprisonment, or both, and, upon the 15th of August, the plaintiff was ordered by the town marshal, acting under the authority of the mayor, and both claiming to act under the authority of the ordinance, to close his barroom, and he complied with the order. About a month later, he obtained the injunction in this suit and re-established himself in business under its protection. The important difference, to which we have referred, between the case of Pucheu and that of plaintiff is this: that, in the former case, the defendant proved the adoption of the ordinance upon which it relied but did not prove its publication, whereas, in the instant case, we find the following admission in the record, to-wit;

"It is admitted by counsel for the plaintiff that ordinance No. 98 of the mayor and board of aldermen of the town of Jennings was published in the Jennings Times for four consecutive weeks, immediately after June 9, 1901. It is admitted by counsel for defendant that plaintiff has license to sell liquor from the United States, from the state of Louisiana, and from the parish of Calcasieu, for the year 1901, issued prior to the passage of ordinance No. 98, and that he closed his place of business under the same circumstances as did Donat Pucheu, plaintiff in the suit No. 3979. And this case is now submitted on the foregoing admissions and on the evidence introduced upon the trial of the case No. 3979, entitled Donat Pucheu vs. Town of Jennings, as far as applicable, and subject to the same objections and exceptions."

Upon the facts thus presented, we are of opinion that the district court properly declined jurisdiction to maintain the injunction, since, it appearing that the effect of the injunction was to prohibit the enforcement of an ordinance in the nature of a police regulation, the question of the legality or constitutionality of such ordinance, whether as to all of its provisions, or in part, should be left to the court in which the attempt is made to enforce it, a remedy by appeal to this court being open, in such cases, to the party as against whom the attempt is made. *City vs. Becker*, 31 Ann. 644; *Hottinger vs. City*,

Pucheu vs. Town of Jennings.

42 Ann. 629; Darcantel vs. Slaughterhouse Company, 44 Ann. 645; State *ex rel.* City vs. Judge, 48 Ann. 1449; Lecourt vs. Superintendent, etc., 49 Ann. 488; State vs. Crozier, 50 Ann. 247. The claim of the defendant for damages, other than attorney's fee, is predicated upon the idea that the town has been deprived of fines, at the rate of \$100 a day, that would have been imposed upon, and collected from, plaintiff if it had not been for the injunction, and this idea rests upon the assumption that the plaintiff would have gone on paying such fines for the privilege of conducting a business the gross revenue of which was about one-tenth of the amount of the fines. Beyond this, some testimony, unauthorized by the pleadings, was offered in the other case as to the extra expense to which the town had been subjected by reason of the injunction, but it is not altogether clear that the testimony is applicable here, nor does it, in any event, fix the liability for such expense with reasonable certainty. The case is not one which, in our opinion, calls for the infliction of punitive damages. It is, therefore, ordered, adjudged, and decreed, that the judgment appealed from be amended by rejecting the demand of the plaintiff with costs in both courts and as amended, affirmed.

No. 14,266.

DONAT PUCHEU VS. TOWN OF JENNINGS.

SYLLABUS.

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In a case to which a municipal corporation is a party and where the questions to be determined affect the police regulations of a community, some latitude will be allowed in the interest of the public, and where the corporation has failed to establish an important fact by reason of incompetent evidence, and it is apparent that competent evidence is obtainable, the case will be remanded.

A PPEAL from the fifteenth judicial district, parish of Calcasieu.
—Miller, J.

Fournet & Fournet, for plaintiff, appellant.

Cline & Cline, for defendant, appellee.

The opinion of the court was delivered by

MONROE, J. Plaintiff filed this suit, September 14th, 1901, alleging that he was, at that time, and had been, since the month of February, keeping a barroom in the town of Jennings; that, for the year 1901, he had paid federal, state, and parish licenses therefor, and had conducted the business in an orderly manner "in no way contravening any lawful ordinance of the town," but that the town, "through its mayor and aldermen, had, in violation of his legal and constitutional rights, forcibly hindered and interfered with him" by unlawfully issuing a warrant for his arrest in an attempt to impose upon him an excessive fine, and threatened to incarcerate him in a calaboose, * * * forcing him to employ counsel to defend his just rights," etc., thus inflicting great damage on him; and that, unless restrained, the town would continue in its unlawful course to his irreparable injury; and he prayed for an injunction restraining said town and its officers from interfering with him in the conduct of his business, and for judgment making the same perpetual and awarding him damages in the sum of \$2000. The defendant, town, excepted that the court was without jurisdiction *ratione materiae et personae*, and that the petition disclosed no right, or cause, of action. It admitted that the plaintiff was conducting a barroom, as alleged by him, and it is averred that, by the wrongful issuance of the injunction, he had been enabled to do so in violation of a valid ordinance of the town, thereby preventing the town from collecting fines, to the amount of \$100 a day from the date of the issuance of the writ, and subjecting it to an expense of \$250 as the fee of its attorney, employed to obtain the dissolution of said writ; and it prayed that the injunction be dissolved, the suit dismissed, and the plaintiff condemned in damages. The exceptions were referred to the merits, but, after trial on the merits, the exception to jurisdiction was maintained to the extent that the injunction was dissolved and the plaintiff condemned to pay \$250 as attorney's fees.

The decree does not reject the plaintiff's demand for damages or dismiss the suit, it merely dissolves the injunction and condemns him to pay to the defendant \$250, as attorney's fees, with costs. We should suppose that this was inadvertence if it were not for the fact that counsel for defendant states, in his brief, that the judge "before signing the judgment erased "the clause, 'the plaintiff's demand for

damages is dismissed,' leaving the judgment as it is in the record." The defendant has, therefore, filed an answer to the appeal praying that the judgment be amended "by the addition of a decree dismissing the plaintiff's demand with costs and increasing the damages allowed defendant, in accordance with its demand in reconvention."

The evidence shows that the plaintiff had paid the state \$100 and the parish of Calcasieu \$300, as licenses for the business of retail liquor dealer for the year 1901, and that he had, also, paid a license to the United States. It further shows that he was conducting that business in the town of Jennings prior to the 15th of August, that on that day he was ordered by the town marshal who acted under instructions from the mayor, to close his establishment, that he complied with the order, and kept his place closed for a month, when he sued out the injunction in this case and reopened, and that he, thereafter, carried on his business and was so carrying it on at the date of the trial. It is not claimed that the business was a nuisance *per se*, or by reason of the manner in which it was conducted, the action of the mayor and the marshal being predicated entirely upon an ordinance, prohibiting the selling or giving away of spiritous liquors within the limits of the town, under penalty of fine, or imprisonment, or both, which was adopted by the town authorities July 9th, to go into effect August 15th, 1901. Objection was made to the character and sufficiency of the evidence offered to show the adoption and publication of this ordinance, and so far as it related to the adoption of the ordinance, was properly overruled, as the minutes of the mayor and aldermen and the ordinance book of the town were offered and show authority for the prohibition and compliance with law up to that point. Sec. 11, §26 and Sec. 33, Act 136 of 1898. It was attempted to prove publication by oral testimony, and the objection was made, and sustained, that it was not the best evidence obtainable. The judge *a quo*, however, permitted the testimony to go in "to complete the record," and, thereafter, as we assume, considered it for the purposes of his judgment. The objection was well made and properly sustained as the evidence indicates that the office of the newspaper in which the publication is said to have been made was easily accessible, and no reason was given why such publication should not have been proven by its files. The law applicable to the publication provides that "All ordinances * * * shall, as soon as practicable after they are passed, be

published in some newspaper of the municipality, or, if there be no such newspaper, by posting at three or more public places within the corporate limits, for three weeks, and ordinances shall not be enforced unless, for cause, the contrary be ordered, for one month after their passage." Sec. 33, Act 186 of 1898. The publication was, therefore, as much a condition precedent to the enforcement of the ordinance as its adoption. A municipal court may take judicial cognizance of an ordinance of the municipality in which it exercises jurisdiction, but such ordinances must be proved in state courts of general jurisdiction, State *ex rel.* Cotonio vs. Judge, 105 La. 758. And, in order to prove them, it is necessary to show, in the manner required by the rules of evidence, that the law under the authority of which they are to be enforced has been complied with, at least to the extent that they have been adopted and made executory. This has not been done in the instant case, and we are, therefore, constrained to hold that the authority of the mayor and marshal, to interfere with the plaintiff in the conduct of what, for aught that appears from evidence, properly admitted, or admissible, was a lawful business, has not been shown.

There is, however, enough in the record to satisfy us that it is more than probable that the ordinance in question was published as the law requires, and as we are dealing with a municipal corporation in a matter affecting a police regulation of a community, we find ample authority in our jurisprudence for remanding the case in order that it may be more satisfactorily presented. *Millaudon vs. 1st Municipality of New Orleans*, 1st Ann. 215; *Delabigarre vs. 2nd Municipality of New Orleans*, 3 Ann. 230; *Brown vs. Police Jury of Madison*, 4 Ann. 180; *Police Jury vs. McDonough*, *Ib.* 352; *Canal Co. vs. City*, 44 Ann. 394; *City vs. Werlein*, 50 Ann. 1256.

It is, therefore, ordered, adjudged, and decreed, that the judgment appealed from be reversed and that the case be remanded for further proceedings according to law, the defendant and appellee to pay the costs of the appeal.

No. 13,719.

R. M. WALMSLEY & Co., IN LIQUIDATION, vs. W. P. THEUS AND W. W. ARMISTEAD—JAMES BRICE ET ALS., THIRD OPPONENTS; R. M. WALMSLEY & Co., IN LIQUIDATION, vs. NORMAN F. THOMPSON ET ALS., AND W. W. ARMISTEAD vs. JAMES BRICE ET ALS. (CONSOLIDATED.)

107	417
116	634
107	417
119	680

SYLLABUS.

1. A creditor who, by making a partial payment to another holding a prior special mortgage on certain property, has become legally subrogated *pro tanto* to the rights of the latter, is subrogated subordinately to the rights of that creditor to be paid the balance of his debt.
2. A legal subrogation to rights by payment is derived from "the law" not from the consent of the party who receives payment. The fact that the creditor who has received the payment has written the words "paid" or "cancelled" upon the particular mortgage note for which he has received payment, does not prevent legal subrogation taking place in favor of the person making the payment, if he be otherwise entitled to it. Other creditors cannot urge such fact in their own favor when the mortgage remains uncanceled upon the record.
3. The law does not take note of the origin of the moneys with which a payment is made which carries legal subrogation with it as its effect; legal subrogation takes place though the payment be made by money borrowed by the party making the payment or furnished to him by another person for that purpose.
4. A third possessor who pays off special mortgages existing on property at the time of its acquisition, becomes thereby legally subrogated to the rights of the mortgagee who has been paid and the subrogation is not lost because the third possessor may be subsequently evicted. The character and effect of the payment which attached to it when made remain unaffected.
5. A prior mortgage creditor who intervenes by third opposition under a sale made by a junior creditor and claims the proceeds of sale by preference, consents thereby to a transfer of his mortgage rights from the property to the proceeds sale in the hands of the sheriff and he cannot claim that, under Art. 684 of the Code of Practice, the price bid was insufficient to carry the title and entitle the purchaser to a deed.

ON REHEARING.

1. The wife had paraphernal interests to protect. She obtained a judgment of separation of property. The *dation* to her by her husband was annulled. She, none the less, retained the administration of her separate interest, as the judgment of separation was not null in so far as it dissolved the community and gave her the right to manage her separate interests.
2. She became the owner of a separate interest in property owned by her husband (she was his creditor) and for that reason had the right to pay a debt against him and to legal subrogation, provided it did not come in

conflict with the transferror's mortgage, who retained, under the rule which controls legal subrogation, all his rights on notes unpaid in his hands.

3. The owner has an interest that his property be sold for an amount sufficient to pay mortgages in rank superior to those of the seizing creditor. The sale is null when made for less than the amount of the mortgage first in rank.

A PPEAL from the Third Judicial District, Parish of Bienville--
Richardson, J. ad hoc.

J. Rush Wimberly and Andrews & Hakenyos, for R. M. Walmsley & Co., in Liquidation, Appellees.

Dormon & Reynolds, for W. P. Theus, Appellant.

Pierson & Pierson and L. K. Watkins, for W. W. Armistead, Appellee.

J. C. Theus, for Mrs. Hattie E. Singleton and her husband and the minor children, heirs of Mrs. Maggie V. Theus, deceased, and James Brice, Appellants.

The opinion of the court was delivered by NICHOLLS, C. J.

On rehearing by BREAU, J.

STATEMENT OF THE CASE.

NICHOLLS, C. J. The following extract is taken from the reasons for judgment assigned by the District Court for the judgment rendered by it in this case:

In these consolidated cases is involved a contest for the proceeds of the sale of certain real and personal property based on alleged priority of mortgage and privilege.

On the 19th day of October, 1891, William P. Theus executed a conventional mortgage to Norman F. Thompson, of New York City, on 2880 acres of land and building and improvements thereon, situated in Bienville Parish, Louisiana, to secure the payment of a loan made by said mortgagee, amounting to seventy-six hundred and eighty-nine and

9-100 dollars (\$7689.09), evidenced by promissory notes or bonds, as follows, viz:

- One for \$68.50, due December 1st, 1891.
- One for \$1240.00, due December 1st, 1892.
- One for \$1121.61, due December 1st, 1893.
- One for \$1013.50, due December 1st, 1894.
- One for \$914.30, due December 1st, 1895.
- One for \$823.00, due December 1st, 1896.
- One for \$738.92, due December 1st, 1897.
- One for \$660.05, due December 1st, 1898.
- One for \$588.17, due December 1st, 1899.
- One for \$520.64, due December 1st, 1900.

All payable in gold—principal and interest—at the Merchants' and Farmers' Bank, Shreveport, La.

Other stipulations not material to the questions at issue were incorporated in this mortgage, which was duly recorded October 24th, 1891, in mortgage book "F," page 600, of Bienville Parish, La.

The notes or bonds thus secured were made payable to the mortgagee, "Norman F. Thompson or order," and bear 5% interest before and 8% interest after maturity.

On the 28th day of December, 1891, the said mortgagor, William P. Theus, executed another or second conventional mortgage on the same real property to secure the payment of two promissory notes, each for twenty-five hundred and forty-nine and 30-100 dollars, aggregating \$5098.00. This mortgage was duly recorded in the mortgage office of Bienville Parish.

On the 25th day of June, A. D. 1896, this mortgage was rendered executory by a judgment of this court, which embraced an additional sum of \$2000.00, with 8% per annum interest on same from November 2nd, 1891, subject to a credit of \$642.73, July 17th, 1893, and costs of suit. This judgment is against "W. P. Theus and W. W. Armistead *in solido*."

On the 11th day of November, 1898, a writ of *fi. fa.* was issued on this judgment, and the sheriff of Bienville Parish seized this mortgaged property and the personal property shown by his returns. After due advertisement, the sheriff adjudicated the mortgaged property to W. W. Armistead for \$4981.00 on the 31st day of December, 1898. Personal property was adjudicated as follows: To W. W. Armistead for \$375.00; to James Brice for \$368.25.

The deputy sheriff declined to execute an act evidencing said adjudication of the 2840 acres of mortgaged realty, for the alleged reason that the bid of Armistead was not sufficient to cover the prior mortgage to Norman F. Thompson, shown by the mortgage certificate to be still on record.

On the 28th day of September, 1898, R. M. Walmsley & Co., in Liquidation, instituted suit No. 1804 in this court against Norman F. Thompson *et als.*, alleging that all the installments secured by the prior mortgage, except the last three unmatured notes, had been paid and that the prior mortgage had been, to that extent, extinguished. And plaintiff prayed that it be so decreed, and the mortgage erased.

On the 22nd day of June, 1899, W. W. Armistead instituted suit No. 1863 in this court against James Brice *et als.*, alleging the payment and cancellation of the Norman F. Thompson notes maturing prior to 1898 and the extinguishment of said mortgage, *pro tanto*.

Said Armistead alleges his purchase of the mortgaged land, his tender of payment of the price of adjudication, and makes necessary allegations and parties to complete his alleged *inchoate* title.

He puts at issue the third opposition of James Brice individually and as under-tutor of the minor children of Mrs. Maggie V. Theus, deceased, and the opposition of Mrs. Hattie E. Singleton. The opposition of James Brice alleges ownership of the Norman F. Thompson notes maturing in 1896 and 1897, respectively, and that he is subrogated to the rights of Norman F. Thompson's mortgagee and prays for judgment accordingly.

The oppositions of the heirs of Mrs. Maggie V. Theus make like claims of the notes maturing in 1893 and 1894 and 1895 in favor of the said Norman F. Thompson mortgages.

These oppositions were filed December 31st, 1898, the day of sale of the mortgaged property.

On the 10th day of March, 1899, James Brice filed suit No. 1842 against W. P. Theus, alleging indebtedness of defendant, W. P. Theus, to him; insolvency of defendant, and averring that he had paid the Norman F. Thompson prior mortgage notes maturing in 1892, 1896 and 1897, and was and is therefore subrogated to all the rights of the original payee and mortgages.

His prayer is that his claim be enforced on the mortgaged property. The various suits and oppositions were at issue in all essential mat-

ters; and a voluminous record contains the evidence to guide the court to a final conclusion and judgment.

Of the many claims and counter-claims but few are material for the consideration of the court. Chief among these are the third oppositions of Captain James Brice and of the heirs of Mrs. Maggie V. Theus, whose contentions involve the question of extinguishment *vel non* of the Norman F. Thompson notes and prior mortgage on the land in question for the years 1892, 1893, 1894, 1895, 1896 and 1897.

It is in evidence that the note due in 1892 was paid without any endorsement or assignment and that the endorsement, "The within note was paid by Captain James Brice, 12-19-92," was placed there at the instance of W. P. Theus, after he got the note. See evidence, page 52.

The note due in 1893 was or is marked "cancelled." "Cancelled" on its face in stamped letters.

The note due in 1894 is stamped "Paid Dec. 13, 1894. Delta Trust and Banking Co., Vicksburg, Miss."

The note due in 1895 is stamped "Cancelled," "Cancelled," "Cancelled," "Cancelled," on its face.

The note due in 1896 is likewise stamped "Cancelled," "Cancelled," "Cancelled," "Cancelled," on its face, and "Cancelled," "Cancelled," on its back.

The testimony of P. M. Harding, of Vicksburg, Miss., taken by commission at the instance of R. M. Walmsley & Co., in Liquidation, is material, and I quote as follows:

Answer to first Interrogatory:

"I am a resident of Vicksburg, Mississippi, and am president of the Delta Trust and Banking Company."

Answer to Interrogatory No. 2:

"I am agent for the Equitable Securities Company of New York in the matter of collecting their loans and looking after their real estate in this State and Louisiana."

Answer to Interrogatory No. 3:

"The Theus loan is in the territory and I look after the collection of that along with others, though the papers are not in my possession, but when payments are made to me I order the papers from New York."

Answer to Interrogatory No. 4:

"I have no recollection of any agreement with Mrs. Theus to subrogate the rights of the holders of the notes to her in the event of her paying the notes."

Answer to Interrogatory No. 5:

"It has been our policy to not subrogate our rights to third parties in the State of Louisiana until the whole of the indebtedness might be paid, and in this event the holders of the notes would be willing to assign them without recourse."

Answer to Interrogatory No. 6:

"Seven notes in the Theus loan have been paid, all of which have been marked paid and cancelled, with the exception of the note maturing December, 1897, which was paid by Captain James Brice, with the understanding that we would hold this note until all of the remaining notes in the loan were paid by him, when the 1897 note and the balance, if paid by him, were to be assigned to him, without recourse."

Answer to Interrogatory No. 7:

"All of the notes that may have been marked paid or cancelled were so marked purposely and not through error."

Answer to Interrogatory No. 8:

"I have had correspondence with some of the parties named."

Answer to Interrogatory No. 9:

"I have forwarded letters with my answers to Messrs. Dorman and Reynolds, and refer you to them, as it would take considerable time to get up the correspondence again."

Answer to Interrogatory No. 10:

"I have no instruction in reference to assigning any of the notes to Mrs. Theus, but, as stated before, there is an agreement with Captain James Brice by which the notes maturing December, 1897, with the remaining notes in the loan, were to be assigned to him, provided he pay the remaining notes, and whenever the last note in the loan has been paid."

Answer to Interrogatory No. 11:

"The notes were marked paid or cancelled in accordance with our usual custom and not through error."

Answer to Interrogatory No. 12:

"The Theus loan has been in my charge as agent for the Equitable Securities Company since about 1894. I have received no instructions from my principals in reference to subrogating notes—in fact, I would have no authority to subrogate notes in Louisiana."

Answer to Interrogatory No. 13:

"It is my understanding that Norman F. Thompson has properly assigned these notes to the Equitable Mortgage Company and that they

were in turn assigned by said company and its receivers to the Equitable Securities Company, who are the present holders of the notes."

Answer to Interrogatory No. 14:

"As I do not know the dates of the assignments, I am unable to answer this question."

Cross-Examination.

Answer to Cross-Interrogatory No. 1:

"Notes are usually assigned by a form of assignment executed by Norman F. Thompson, as it was not customary for him to write an assignment on the back of each note, for owing to the great number of notes this would consume considerable time and labor, and an assignment of the whole loan would suffice."

Answer to Cross-Interrogatory No. 2:

"The notes are payable to Norman F. Thompson or order."

This evidence is conclusive of the intentions and acts of lender and loan company. Recognizing the well settled laws of Louisiana providing that the transferors of a part of a series of mortgage notes cannot compete with their transferees in the distribution of the proceeds of the mortgaged property, they declined to subrogate any one to their rights as original mortgagees, by convention, or to allow the possibility of legal subrogation. This is evidenced not only by the above quoted testimony and the letters to Messrs. Dorman and Reynolds on the subject, but also by the stamped "Cancellation" or "Paid" on the notes.

This conclusion is not changed by the rather contradictory and irreconcilable evidence found in the record on other branches of these consolidated cases.

But the note in favor of Norman F. Thompson, "or order," maturing in 1897 was not extinguished by payment as were those of the preceding years, but was, or is, held by the assignee of Norman F. Thompson, and the payment of same acknowledged to have been made by Captain James Brice, third opponent, to whom it is to be transferred upon payment of the subsequently maturing notes, due in 1898, 1899 and 1900. This is a conditional agreement to transfer the note with subrogation, but the conditions have not happened.

But Article 2161 of the Civil Code provides: "Subrogations take the place of right."

"1. For the benefit of him who, being himself a creditor, pays another creditor, whose claim is preferable to his by reason of his privilege or mortgage."

In *Ziegler vs. His Creditors*, 49 Ann. 188, the court held:

"After all, on this question is not the Code itself enough? Its conciseness of expression that subrogation takes place in favor of the creditor who pays another whose debt is preferable by reason of his privilege or mortgage, would certainly seem to preclude any aid for interpretation. We think reason and authority, as well as the text of the Code, sustain our opinion that gives the bank in this case, the creditor of Ziegler, the subrogation of that mortgage securing the debt the bank discharged."

In the case above quoted the "bank" was an ordinary creditor, as in the case now under consideration.

While Captain Brice does not seem to have been a very exacting or careful creditor, owing to the relationship, it is conclusively established that he was and is a creditor of the mortgagor for a large amount, and hence had an interest in making the payment, if subrogation would result.

The evidence does not lead to a like conclusion on the other oppositions filed by the heirs of Mrs. M. V. Theus, deceased.

In the 4th R. 416, it is correctly held that the maker of mortgage notes cannot pay them, thereby extinguishing the mortgage and reissue them to a third party with the same mortgage security.

The oppositions of the Fleming Company are supported by the evidence for what are necessary plantation supplies—less the credits which must be applied to the privileged debts.

For these reasons there will be judgment sustaining the opposition of Captain James Brice to the extent of the Norman F. Thompson note due December 1st, 1897, as a legal subrogation and reserving whatever rights he may have on claims for interest paid on subsequently maturing notes. In other respects his opposition will be rejected.

The oppositions of the minor heirs of Mrs. Maggie V. Theus, represented by James Brice, under-tutor, and of Mrs. Hattie E. Singleton and husband will be rejected with costs.

The oppositions of the Fleming Company will be sustained for legally necessary plantation supplies, less lawful credits shown to have been paid.

There will be judgment in favor of W. W. Armistead ordering the clerk, *ex officio* recorder of Bienville Parish, to cancel and erase the mortgage, reserving the Norman F. Thompson notes due in 1891, 1892, 1893, 1894, 1895 and 1896, and ordering the sheriff of Bienville Par-

Walmsley & Co., in Liquidation—Consolidated.

ish, La., to make and execute a *proces verbal* and act of sale of lands and improvements embraced in the adjudication of December 31st, 1898. And of the personal property adjudicated to him and others to the parties to and on the terms of said adjudication.

R. M. Walmsley & Co., in Liquidation, will have judgment ordering the same cancelled, as ordered in favor of W. W. Armistead.

Costs, including fees due curator *ad hoc*, to follow judgment.

(Nos. 1534, 1804 and 1863, consolidated. In Bienville Parish. Opinion of the court. Special District Judge. Filed September 17th, 1900. F. L. Mayfield, Deputy Clerk, District Court.)

OPINION.

This case comes before us with all the documents connected with a number of suits which were consolidated and tried together in the District Court. When it reaches this court the issues are much narrowed. We understand them to be confined:

1st. To a demand made by W. W. Armistead, who purchased the property sold in the matter of Walmsley & Co., in Liquidation, vs. W. P. Theus and W. W. Armistead, to have the sheriff execute to him a deed in conformity with the adjudication and the law.

2nd. A demand by Walmsley & Co. to have the special mortgage in favor of Norman F. Thompson, executed on the 19th of October, 1891, to secure the payment of a number of promissory notes, declared extinguished and the record thereof erased; and that they be paid by preference over all other persons the price of the property sold.

3rd. A third opposition by James Brice, claiming to be paid out of the funds in the hands of the sheriff by preference over Walmsley & Co., the seizing creditors, the sum of \$823, with interest, attorney's fees and costs, and the further sum of \$738.72, with interest, attorney's fees and costs, as having paid two of the notes secured by said mortgage, to-wit: the notes due in December, 1896 and 1897, and by said payment having become subrogated to all the rights of the holders of notes.

4th. A third opposition of the children of Mrs. Maggie V. Brice, deceased wife of W. P. Theus, the seized debtor, claiming to be paid by preference over Walmsley & Co. out of the fund in the hands of the sheriff the sum of \$1121, with interest, attorney's fees and costs, the further sum of \$1058, with interest, attorney's fees and costs, and the further sum of \$914.30, with interest, attorney's fees and costs, by rea-

son of their mother having paid three of the notes secured by said mortgage, to-wit: the notes due in December, 1893, 1894 and 1895, and by said payment having become subrogated to all the rights of the holders of said notes.

The district judge found as a fact that James Brice was a creditor of W. P. Theus and that by reason of that fact he was entitled to be paid with subrogation the amount represented by the promissory note due in December, 1897, but he held that he was not entitled to take with subrogation any other or greater sum out of the hands of the sheriff.

He was of the opinion that Mrs. Maggie V. Brice, wife of W. P. Theus (and her children claiming under her), were not entitled to be paid anything whatever out of the fund in the hands of the sheriff. He ordered the sheriff to execute a deed of sale to W. W. Armistead, as purchaser of the property sold in execution of the judgment of Walmsley & Co., in Liquidation, vs. W. P. Theus and W. W. Armistead.

The judge seems to have been of the opinion that unless the holder of the notes, at the time of their payment, had *consented* to a "transfer" of the same to the person making payment and had made an assignment of the notes paid with subrogation, there could be no subrogation.

That if the holder of the notes had agreed to make such a transfer, with subrogation to a party making a partial payment, if he or she should pay the balance due on the notes at the time of the final payment, no payment with subrogation could take place until these conditions had been fulfilled.

The judge did not, in his judgment, express any opinion whether, as "a matter of fact," James Brice had paid any of the notes, other than the one due in December, 1897, nor whether, as a matter of fact, Mrs. Maggie V. Brice, wife of W. P. Theus, or her children, had paid any one of the notes. He was of the opinion that no matter who may have paid the seven Norman F. Thompson notes shown to have been paid, they became, by the fact of payment, absolutely extinguished as to all parties, and the extinguishment of the notes carried with it simultaneously the extinguishment of the mortgage, that the words "cancelled," "paid," written upon the notes negatived the fact that any transfer or assignment of the notes had been made by the holder of the notes at the time of their payment to either Brice or Mrs. Theus.

We concur in opinion with the district judge that, at the date of the payment of these notes, James Brice was a creditor of W. P. Theus. For the purpose of determining whether he was entitled to subroga-

tion, if he paid any of these notes which were secured by a mortgage having preference over any claim which he had at the time of that payment, the "amount" of that indebtedness does not enter as a factor.

If Brice was, in point of fact, a junior creditor of Theus and he did, in point of fact, pay the mortgage notes which he claims to have paid, there would be no necessity for any act of transfer or assignment of the notes with subrogation to be made to him by Thompson, the Equitable Security Company or the Delta Trust Company. "Payment with subrogation" would result, *ipso facto*, from the fact of the payment by force of the law itself independently of any consent thereto by the holders of the note or notes paid. There may be occasions where, by reason of special circumstances, the holder of notes would be legally justified in refusing to receive payment of the same from one who, by virtue of the payment made by him, would be entitled to subrogation; cases where such subrogation would work injury to the party receiving the payment, but this case presents no exceptional features of that kind. The creditor received and did not refuse payment of some of the notes and no injury could result to it by according subrogation to the party making the payment. The party or parties making the partial payments would, as between themselves and the holder of the notes which they had paid, be subordinated to the rights of the latter.

There is no contest in this case between them. The contest is between other parties. The holder of the unpaid notes has refused to take part in the litigation between Walmsley & Co. (junior creditors) and the seized debtor and stands upon its mortgage rights to be hereafter enforced.

The contest is over the fund now in the hands of the sheriff and between other parties. The holders of the unpaid notes do not assert any claim upon that particular fund. We attach no importance to the fact that the holder of the paid notes should, when he received payment of the same, have written the words "cancelled," "paid," upon them. The notes were, in point of fact, "paid" as between W. P. Theus and the holder, but they were not extinguished or paid as between W. P. Theus and the party or parties making the payment of the holder. The latter could not prevent the placing of these words upon the notes, and they were not prejudiced by that fact in the absence of their having given consent to an absolute extinguishment of the notes

The mortgage has never been erased from the records and Walmsley & Co. were, *ab initio*, subordinated to the legal rights of the holders of the notes secured by mortgage in the Norman F. Thompson mortgage act, whether these notes should be held by the original holders or held by other parties by effect of payment with subrogation. They took their mortgage with knowledge that the Norman F. Thompson notes and mortgage primed their own. They did not deal with W. P. Theus upon the faith of any portion of the Thompson notes having been extinguished. (Dallos & Verge, under Art. 1251, No. 99) cites Civ. C. 20 Juin, 1859, I., 254, to the following effect:

“L'acquéreur est subrogé à tous les droits du créancier qui ne sont pas éteints d'une manière définitive à l'égard des autres créanciers ainsi lors même que mainlevée de l'hypothèque a été donné par le créancier au tiers acquéreur s'il n'y a pas eu radiation cette hypothèque passe à l'acquéreur, la mainlevée étant pour les autres créanciers *res inter alios acta* dont ils ne peuvent invoquer le bénéfice.”

We now direct our attention to the ascertainment of the circumstances under which the seven Thompson notes which have been shown to be paid were paid, and by whom they were paid. We are satisfied that W. P. Theus, the maker of the notes and the mortgage debtor, did not pay them himself, though he may have served as the instrument or channel through which the payment was made. The evidence shows that he was without means to pay them and there is no doubt that the funds with which they were paid were funds furnished by James Brice. Theus, at the time of these payments, was hopelessly embarrassed. In consequence of that fact his wife had obtained from him a separation of property and he had made to her a *dation en paiement* of this property. After this separation had been obtained, she executed to him a notarial power of attorney of the most general character and conducted a mercantile establishment, her husband acting as her agent, in conducting the same. This she had the legal right to do. The *dation en paiement* made to her by her husband was based upon the fact that her husband was indebted to her by reason of certain amounts which had been furnished to her husband by her father and which the former had used in his business which it was supposed were gifts or advances which had been made to the daughter by the father. Creditors of the husband attacked the *dation en paiement* as not having had a legal basis to rest upon. The court held that no matter what might have been the intentions of the

father, they were not made to appear in a shape such as to authorize it to consider the funds which had been furnished by the father other than as loans made to the husband.

The court, therefore, set aside the *dation en paiement*.

The Norman Thompson notes which fell due in December, 1893, 1894 and 1895, were paid while the legal title to this property stood in the records in the name of the wife and while she was in business herself. They were paid by monies furnished by her father, not to the husband, nor for his benefit, but to the wife and for her benefit. This fact, we think, clearly established by the evidence. It matters not whether these funds reached the holder of the notes through the instrumentality of W. P. Theus who, though the debtor, was then her agent, or whether the amounts were paid by checks on Brice. The fact to be ascertained is not "how" the funds were paid, but who actually paid them. The manner in which the payment was made; the instrumentality through which the mere act of payment was made, may embarrass the solution of that question as a matter of proof or evidence, but they do not affect the legal result when it has been ascertained that the payment was in reality made by the wife and for her benefit. The situation, when these notes were paid, had materially changed from what it was when Brice, before the separation of property, had been obtained, had furnished money to his son-in-law, W. P. Theus. The latter was no longer in business, he was hopelessly embarrassed, he was then acting as the agent of his wife under notarial power of attorney. It was the daughter and not the son-in-law who was then in business, and it could not be reasonably supposed that the father under these circumstances, would advance to the son-in-law instead of his daughter. There is no uncertainty in Brice's testimony on that point and none in that of the husband. The monies to make the payment were drawn by checks or drafts made by Moreland, the book-keeper, not of the husband, but of the wife, and for the wife and not for the husband. Would the fact that the payment was made with monies received by the wife from her father affect the legal situation as to subrogation, if the payment was in fact made by her? That question has been raised in France and decided in the negative. "The law," says Laurent (Vol. 18, Section 78) "takes no note of the origin of monies with which the payment was made, whether it be borrowed or not." We think that payment of the notes falling due in 1893, 1894 and 1895 were made by the wife.

Did that payment carry subrogation with it? It is very clear that she was not a volunteer in making the payment and that it was not her intention to absolutely extinguish the debt. She had an interest or supposed she had an interest as holding the legal title to the property and third possessor thereof in making the payments she did. Third possessors of mortgaged property, who pay the mortgage debts existing thereon at the time of the acquisition of the same, are subrogated to the rights of the mortgage creditors so paid. Did the fact that the *dation en paiement* was set aside do away with the effect of the subrogation? We think not. We think the payment takes its character at the period of its being made and that it is not altered or affected by the subsequent eviction of the third possessor. We are of the opinion that the three notes falling due in December, 1893, 1894 and 1895, were paid by Mrs. Maggie V. Brice, wife of W. P. Theus, and that by said payment she became subrogated to the rights of the holder of the notes at the time of their payment. Even were this not the case, the District Court would still be in error in its judgment as to the claim of the heirs of Mrs. Maggie V. Theus, to subrogation. They would, under any circumstances, be entitled to subrogation upon the notes which fell due, one in December, 1894 and 1895. The payment made by her of the note which fell due in December, 1893, made her a creditor of her husband to that extent. The subsequent payment made by her of the notes which fell due in December, 1894 and 1895, gave rise to legal subrogation in her favor as to those two notes, under the first paragraph clause of Article 2161 of the Civil Code. We think the note of 1896 was paid in the same way, but the heirs of Mrs. Maggie V. Theus do not claim the benefit of that payment, and James Brice does, who, we think, cannot claim it.

We are of the opinion that the note which fell due in December, 1897, was paid for his own account by James Brice, who, at the time of said payment, was a junior creditor of W. P. Theus, and that by said payment he became subrogated to the rights of the holder of that note at the time of its payment.

The District Court erred in directing the payment of any portion of the funds in the hands of the sheriff to the Equitable Securities Company. They expressly declined participating in the proceedings of Walmsley & Co. in liquidation and have not asked to take any portion of the funds. They must be left free to exercise their legal rights independently of the seizure and sale made herein.

We are of the opinion that the District Court did not err in directing the sheriff to make a deed to W. W. Armistead on the property involved in this litigation under the adjudication made to him at the sheriff's sale in execution of the judgment of Walmsley & Co. in liquidation in these proceedings. James Brice and the heirs of Mrs. Maggie V. Brice, deceased wife of W. P. Theus, having appeared in these proceedings by third opposition, they, by so doing, consented to transfer the mortgage rights which they held upon the property sold (those held by subrogation to the mortgage rights securing the notes which fell due in December, 1893, 1894, 1895, 1896 and 1897) to the proceeds in the hands of the sheriff. The inscription of the mortgage on the property sold, resulting from the act of mortgage granted by W. P. Theus to Norman F. Thompson by notarial act of the 19th October, 1891, before George E. Young, notary public, should be *pro tanto* erased.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that James Brice, third opponent herein, be and he is hereby adjudged and decreed to be subrogated to all the rights which originally secured the payment of the promissory note made and subscribed by W. P. Theus, which fell due in December, 1897, and which note (described in third opponent's pleadings) was identified by paraph with the notarial act of mortgage passed on the 19th of October, 1891, by act before George E. Young, notary public, and that he be paid the amount of said note, principal, interest and costs by preference over Walmsley & Co., in liquidation, the plaintiffs and seizing creditors herein, out of the proceeds of the sale made herein in execution of plaintiff's judgment.

It is further ordered, adjudged and decreed, that Hettie E. Theus, wife of Hampton S. Singleton, and Mary Theus, Emma Theus, Maggie Theus, James Theus, Louise Theus and Blanton Theus, children and heirs of Maggie V. Brice, deceased wife of W. P. Theus, and issue of their marriage, third opponents herein, be and they are hereby adjudged and decreed to be subrogated to all the rights which originally secured the payment of the promissory notes made and subscribed by W. P. Theus, which fell due in December, 1893, 1894 and 1895, and which notes (described in third opponent's pleadings) were identified by paraph with the notarial act of mortgage passed on the 19th of October, 1891, before George E. Young, notary public, and that they be paid by preference the amount of said notes, principal, interest and

costs coming to them, by preference over Walmsley & Co., in liquidation, plaintiffs, and seizing creditors herein, out of the proceeds of the sale made therein in execution of plaintiffs' judgment.

It is further ordered, adjudged and decreed, that the mortgage rights securing the payment of the notes which fell due in December, 1893, 1894, 1895, 1896 and 1897, be and they are hereby decreed to be raised from the property mortgaged and be transferred to the proceeds of the said sale and are secured as to payment in favor of the said third opponents of their mortgage claims, and that said mortgage inscription be reduced accordingly.

It is further ordered, adjudged and decreed, that the sheriff of the Parish of Bienville do execute a deed of sale of the property sold herein to W. W. Armistead, adjudicatee at the sheriff's sale, in conformity to the adjudication made to him.

It is further ordered, adjudged and decreed, that the judgment appealed from in so far as it decrees the payment to the Equitable Security Company out of the proceeds of said sale in the hands of the sheriff, be and the same is hereby annulled, avoided and reversed, said company not claiming any portion of the same.

It is further ordered, adjudged and decreed, that the judgment appealed from in so far as it is not altered or amended by the judgment herein made, is affirmed. Costs of appeal to be borne by appellees.

ON REHEARING.

BREAUX, J. There are different stages in this complicated litigation. We take up one of the last.

Following the rule that one who buys property at sheriff's sale may compel all the interested parties to appear in court and contest their claims to the proceeds, the buyer filed a petition and made the creditors of the seized debtor parties to the suit and thereby created, as it were, a *concurso*, instituted with the view of settling the right of all parties concerned.

He averred that neither James Brice, one of the parties, nor the children of Mrs. Maggie V. Theus, deceased, ever acquired any interest in the mortgage first in rank. The mother of opponents, Mrs. Maggie V. Theus, held interest in this property under a *dation en paiement* which was afterward annulled, it is true, but under the theory of our original opinion she was entitled to subrogation as claimed.

But the adjudicatee, Armistead, is pleased to contend that Brice was

originally a debtor of Walmsley & Co. who hold the second mortgage and that, in consequence, he cannot claim preference by legal subrogation. This contention, we take it, is not sustained by the weight of the testimony and the adjudicatee, Armistead, is not in a position to sustain it, for the reason that Brice had been released from his obligation as a debtor of Walmsley & Co., if he ever has been their debtor. Walmsley's mortgage dated from the year 1891, long prior to the legal subrogation Brice claims. If he had been a debtor, Walmsley & Co., by taking mortgage security and accepting other debtors had completely released Brice. This is stated upon the theory that Brice may have been a debtor as just stated. As to this indebtedness we must say that we are not convinced. He unquestionably paid for the note which fell due as stated in our original opinion, and we, therefore, decline to reopen the question regarding his right as a creditor.

This brings us to the claim of the children of Mrs. Maggie V. Theus, opponents.

It had been argued in behalf of the adjudicatee before named that there was no separation of property between Mrs. Maggie V. Theus and her late husband, and that in consequence if she bought the notes secured by mortgage on the property it fell into and became part of the community between her and her husband. True the *dation en paiement* made by her husband to her was annulled. This did not have the effect of annulling the separation of property and that of dissolving the community which she obtained after the *dation* made to her, annulled as just mentioned, even if she had not property rights against her husband. Besides the judgment of separation had legal effect until it is shown that it was illegal. It has every appearance of legality on its face. The judgment must be considered conclusive in so far as it is legal. *Jones vs Morgan*, 6 Ann. 632.

The wife may protect property she is about to receive if she shows that such a step is necessary because of the disordered condition of her husband's business. *Vickers vs. Block, Britton & Co.*, 31 Ann. 675. The right of the wife to a separation of property is not limited to Art. 2399 of the Code. She may obtain a separation of property in order to protect the return of her industry. *Crockett vs. Gale*, 7 Ann. 343; *Wolf vs. Clark*, 10 Ann. 273. The amount made by the wife for the support of her family may find protection under judgment of separation of property, although she actually owns no claim against her

husband. *Davrock vs. Davey*, 6 Rob. 344. The doctrine in *Davrock vs. Davey* has been reaffirmed in repeated decisions, 24 Ann. 75.

After the *dation en paiement*, to which we have before referred, she became the creditor of her husband. After the issues had been made up in the case of *Ardis & Co. vs. Theus and Armistead*, 47 Ann., but before they had become final, she, from her separate funds, bought the claims in question.

Owing to the want of care in business of her father, whose only heir she was, the amounts were handed over to the son-in-law without attention to legal form to the end of protecting her interest. She became the owner of the note payable in 1893. There was good reason for her to seek to become its owner. After she had bought that note she was beyond all question a creditor of her husband and had an absolute right as had all the other creditors to become subrogated by legal subrogation. She was not an anxious and nervous creditor, seeking to take advantage of her husband's creditor, but as a creditor, only availed herself of the right the law accords to any creditor.

The book-keeper of the late Mrs. Theus testified that he had paid the amount for her and that the notes were afterward sent to her. Other testimony sustains the statement. To the extent that Mrs. Theus took up two of the notes, she is entitled to recovery, that is, she has a right to the principal and interest paid by her, but not to the interest on the amount since she took up the notes, for then she would become interested in an account against her husband, a claim not sanctioned by law. The wife may acquire a claim against her husband under circumstances justifying the transfer to her by the creditor, but the claim ceases to bear interest as it is regarding all other claims by her against him.

Before leaving this branch of the case, we insert here as controlling between the transferee and the transferor the following: The subrogation established by the proceeding articles takes place as well against the sureties as against the debtors. It cannot injure the creditor since, if he has been paid but in part, he may exercise his right for what remains due in preference to him from whom he has received a partial payment. C. C. 2162. This article sets at rest all question of all advantage over the creditors who transferred their claim. As relates to the wife, or her heirs, she only recovers that which was her own in collecting a claim that would have been collected by the original creditors if the transfer had not been made.

This brings us to a consideration of the validity of the sale of the property, an important question before us on the rehearing.

The mortgage creditors second in rank chose to foreclose without insisting upon the trial of a suit brought to have the prior mortgage erased to the extent that it had been paid and they were entitled to its erasure. The sheriff's return states that the mortgage certificate evidenced a prior mortgage for more than the amount of the bid and that, in consequence, he declined to make a deed to the property. The sheriff, we understand, complied with the law and announced to the bystanders that no adjudication could be made unless the bid covered the prior special mortgage. His return sets forth that he complied with all of the law's requirements in this respect.

The amount bid for the property did not exceed the prior special mortgages. It follows that the offer to sell made by the sheriff cannot be completed in view of the objection pleaded. The Code of Practice is general in the language used. The right to raise the objection is not limited to the mortgage creditors prior in matter of rank of mortgage, but also includes the owner as one to whom the right is given to object.

With reference to a similar ground as the one before us for consideration, Judge Martin, with clearness and precision, said that such a sale was null because no price had been received by the creditor; that there could be no sale without a price. *DeArmas vs. Morgan*, 3 N. S. 606. This view was subsequently affirmed in another decision in the early days of Louisiana jurisprudence. *Balfour vs. Chew*, 4 N. S. 162. Subsequently the question was discussed. The court said: "The provisions of law on this subject were designed exclusively for the interest and protection of the owner of the property and those having a real right in it growing out of the property. *Whitehead vs. Cramer*, 9 Ann. 218."

The right of the owner in this regard was specially referred to in these words: "If a special mortgage or privilege certified to exist, be extinguished, or never attached, the owner or his creditors in case of a surrender may recover the amount." *Perry vs. Holloway*, 10 Rob. 107. In another case the court held that equity forbids that the buyer shall take property without paying the price, or, on the other hand, if there is no price that then he shall have it sold for the benefit of other creditors. The defendant or special mortgagees might have caused it to be annulled. *Laurence vs. Birdall*, 6 Ann. 689. In the case from

which we have just quoted exceptions are mentioned which may take a case out of the general rule. The exceptions do not apply to the case before us.

The owner's interest that his property should not be sold at a less price than the law required is obvious. *Land and Husband va. Cameron*, 36 Ann. 776.

When the creditor is to take nothing from the proceeds, he is placed in the attitude of causing the sale of his debtor's property to no purpose in so far as he is concerned. This, the Article of the Code on the subject, in effect, lays down, cannot be done and when it occurs, the owner of the property, ordinarily, is prejudiced and can be heard. The sale is for the payment of the creditor's claim. The language of Art. 684 does not seem to contemplate that it shall be considered as valid and binding when another creditor than the seizing creditor is the one to be paid as a result of the offering at the instance of a creditor.

The nullity, it is true, is relative and not absolute. This nullity can be pronounced when all the parties in interest are before the court and the issue of nullity, *vel non*, comes up as in this case before the sale has been completed.

The question, as before stated, grows out of the refusal of the sheriff to give a deed and deliver the property. There is and can be, in our view, no question of damages arising from an illegal seizure or detention of the property, for the seizing creditor had the right to have the property seized and since that time it has been in *gremio legis* for which no one can be held responsible.

It is, therefore, ordered, adjudged, and decreed, that James Brice is recognized as a creditor for the sum which fell due in 1897, decreed in the original judgment, that is of principal on note, interest, and attorney's fee on this note to be entitled to preference over Walmsley & Co.

It is further ordered, adjudged, and decreed, that the heirs of the late Mrs. W. P. Theus are entitled to the notes which matured in 1894 and 1895 and to interest at five per centum per annum, as stipulated from their respective dates to the date they were paid and fee of attorney. That portion of the original decree recognizing her heirs as owners and subrogees as relates to the note of 1893 is stricken out of the original decree and not allowed. The property is burdened also

with the mortgage securing the payment of the notes which matured in 1898, 1899 and 1900.

It is further ordered, adjudged, and decreed, that the adjudication of the property to W. W. Armistead on the fifth of January, 1899, is null and set aside.

As such the judgment heretofore handed down by us in this case is amended to conform with our present decision and decree, and as amended it is affirmed.

No. 14,064.

JESSE W. KING ET ALS. VS. J. D. KING AND OTHERS.

SYLLABUS.

1. An heir cannot be compelled to collate an amount expended to send him to school, although he failed to avail himself of the opportunity offered him to attend school. Art. 1244 C. C.
2. Collation is not due of amounts expended to defend a minor against whom a criminal charge had been brought.
3. The cardinal object of the *collatio bonorum* is equality in the partition, in order to prevent jealousy and bickering among heirs about property. The law would fall of its object if heirs were made to collate unless upon ample proof that collation is due.
4. An heir by whom collation is due for the amount of a note bearing interest is a debtor for principal and interest for collation.
5. Grandchildren who elect to take as heirs must return to the mass a legacy left them in satisfaction of their portion.
6. Grandchildren apparently in the attitude of having accepted a succession and the gifts made to their father by their grandfather cannot claim from their grandparents' succession without regard to the benefit received by themselves from the gifts they wish to ignore.
7. Collation is due by grandchildren to grandparents for care and board and lodging. They are entitled to credit for work done by them for their grandparents.
8. A legacy not left to forced heirs as an extra portion must be returned to the mass of the succession, in view of the fact that it is evident the testator intended it in full satisfaction of all claims as heirs.
9. Heirs cannot exercise the rights of creditors against their co-heirs in order to benefit themselves by showing an attempt of a co-heir to shield his share of inheritance from the pursuit of his creditors.
10. An heir who admits that the amount represented by his note is due as collation, cannot sustain prescription as a bar to recovery of interest on a note bearing interest.

ON REHEARING.

1. The heir having admitted an indebtedness to the succession growing out of joint venture is debited.
2. Costs of a prior suit on appeal follow the judgment.

A PPEAL from the Fourth Judicial District, Parish of Union—
Pearce, Special Judge.

John B. Holstead, for Plaintiffs, Appellees.

Barksdale & Barksdale, for Defendants, Appellants

The opinion of the court was delivered by BREAU, J

On application for a rehearing by BREAU, J

BREAU, J. This was an action for a partition. Sarah N. King died in 1896, and Joseph G. King in 1898, leaving seven children, issue of their marriage, and two grandchildren, daughters of a predeceased son. Four of the heirs brought this suit for a partition. Joseph G. King died testate and Sarah N. King died intestate. The will was duly probated and J. W. King was appointed executor.

Three of the heirs, namely, J. D. King and the grandchildren, brought suit against the executor for an accounting, and afterwards filed an opposition to his account. Their opposition was sustained to the extent of reducing the legacies left by Joseph G. King to the disposable portion.

The crop made by Joseph G. King after the death of his wife was, as asked in this opposition, decreed to belong to his succession, and the remainder of the property was decreed to belong to the community which had existed between Joseph G. King and Sarah N. King.

The judgment homologating this account has disposed of some of the issues and in consequence they are not before us on appeal, as no appeal was taken from that judgment.

In the partition suit now before us for decision (brought by Jesse W. King, Zylphia Hester, wife of John Hester, Bettie McCrary, wife of Robert McCrary, and Fannie Roberts, wife of Charles B. Roberts), against their co-heirs, it appears that the heirs do not disagree regarding the necessity of selling the property to effect a partition, except as to one of the places known as "Swamp" in the Parish of Morehouse. Plaintiffs ask that this place be sold; the defendants oppose the sale, and contend that it can be divided in kind.

There is a life policy forming part of the assets amounting to six thousand dollars. We understand that the amount has been collected

since the judgment appealed from was rendered and that as to this policy also there remains no issues to be decided by this court.

We may as well say now that we agree with the judge of the District Court that the "Swamp" place should be sold to effect a partition. The testimony discloses that there are three hundred and fifty acres in this place; that it is a cotton farm and has on it improvements generally made on such farms; that it would not be possible to divide it in the number of shares corresponding to the number of heirs—that is, in eight equal parts, without materially diminishing its value. These facts are sufficient to justify the order of sale instead of an order to divide the place in kind. C. C. 1340.

We may also as well state here that the appellees' counsel in the brief interposes objection to that part of the decree appealed from which orders that the sale be made by the executor. In the brief it is stated, and the statement is not denied, that the executor is an absentee, besides he has delivered, or he is about to deliver all the property of which he may have the seizin to the heirs to be divided. Under these circumstances, the sale should be made by another authorized officer of the property to be sold at public auction.

This brings us to a consideration of the real issues of the case. The amount involved is not large.

Four of the heirs, plaintiffs, demand collations from the defendants in larger amounts than heretofore decreed, while defendants insist that plaintiffs and not they owe larger amounts. We pass only upon the contested items and leave the others, without comment, as disposed of in the judgment of the District Court.

We take up in the first place for decision the account of J. W. King (who is also the executor) in so far as he, as an heir, owes amounts to be collated. He is one of the plaintiffs in the suit before us for a partition. One of the claims heretofore rejected which the defendant contends should be collated by J. W. King is an item of eighty dollars expenses incurred by the late Joseph G. King, his father, to send him to school. This son was grown at the time, but not of age. He did not choose to remain at the school to which he was sent, but returned after a few weeks' absence from home. The purpose of the father in handing the money to his son for his schooling was not carried out. It may have been mis-spent by the minor, who is, none the less, not accountable, in view of his minority. Besides, the traveling expenses to the

school, at which he did not remain, may be considered in the character of expenses for education, such as it may have been.

There is another amount which the defendants charge should be collated by this heir; some two hundred and fifty dollars. We agree with the district judge in not allowing this claim. The amount was not large and was expended by the wayward son, who was a minor. It would serve no purpose to set forth the wrongs charged to have been committed by this heir and place them under the garish light of publicity.

Defendants charge that this heir should be charged with the use of a steam gin. We are not of the opinion that this item is sustained by the testimony. The gin was operated for joint account of the deceased and this son. The latter testified that he had received an amount, whether for the joint account, or for his own after settlement, is not shown.

The amounts for rent due by this heir as charged, and the value of the property ordered to be collated, have every appearance of being correct. This heir avers that he worked for his father a long time after he was twenty-one years old. He claims for the services rendered. The testimony has not produced the conviction that this claim should be allowed.

One of the defendants, the heir G. L. King, objects to collating the amount of a note given by him to his father for one thousand dollars some years ago, and he objects to paying eight per cent. interest on the note, all as carried in the account which was approved in the District Court. This heir admitted that he had received the amount as charged, but stoutly denies the right of his co-heirs to recover interest thereon.

Ordinarily interest is not due on amounts brought to the mass by collating heirs. But this is an exceptional case. This heir bound himself to pay interest. The question is not new in this jurisdiction. This court held, though interest had been remitted (clandestinely, it is true) to give an advantage to heirs, that it must be brought back to the mass of the succession. *LeBlanc vs. Bertant*, 16th Ann. 298. This heir having promised to pay this interest, we yield to the precedent established.

Against this heir, plaintiffs set forth and contend that he used at least twelve hundred dollars of his father's money, pretending to go to school after he was of age, and that he should be charged with this amount in addition to the amount found against him by the district judge. This claim is made on the uncorroborated testimony of the ex-

ecutor. It is vague and indefinite, besides, being for more than five hundred dollars, cannot be considered as proved by the testimony of one witness without corroborating circumstance.

The account, as relates to collation due by Mrs. McCrary, one of the heirs, needs but little attention. Its correctness is not seriously disputed. Her admissions in the pleadings and her statements as a witness have properly been held as satisfactorily establishing amounts due by her. This is also true as relates to the correctness of items which Mrs. Roberts, another of the heirs, was ordered to collate.

Plaintiffs and appellees contend that Vada King and her sister, Mrs. Stella King Johnson, should be made to collate amounts which they claim were due by their late father, W. R. King, to their grandfather and grandmother; also certain benefits of which they were the recipients, while their father was living. The indebtedness of the father, which plaintiffs urge these grandchildren should collate, consisted of the value of seven bales of cotton and other property of little value, and also an amount as due for the use of the Morehouse place.

The indebtedness of these grandchildren, plaintiffs and appellees urge, consisted of one sum of two hundred dollars bequeathed to them in the will of the late J. G. King, and of one thousand dollars for twelve years' board and lodging furnished by the deceased to the late father and those two heirs.

Returning to a consideration of the claim against the father's succession for which plaintiffs contend these heirs are indebted, we take up, in the first place, the claim for cotton. It appears that the land of the late Jos. G. King, cultivated by W. R. King, was abandoned early in the crop season by the first laborer who undertook to make this crop, and that after the abandonment, the late father of these heirs, W. R. King, cultivated it, and made the seven bales which were disposed of as his own. It was not the cotton of the late Joseph G. King, and, therefore, not within the rule requiring forced heirs to collate. The co-heirs of these grandchildren (viz: their uncles and aunts) who were called with them to this inheritance were given credit for one sum of one hundred and ten dollars. These two heirs insist that they should not be made to return this amount to the mass, for the reason that grandchildren of a deceased and children of a predeceased father, coming to the partition of the grandfather's estate, with uncles and aunts, are not obliged to collate an onerous obligation due by their father.

We are not concerned with the theory, the correctness of which we have no disposition to question at this time, that as an independent proposition, heirs who inherit in their own right—i. e., grandchildren who are called directly to an inheritance, and not by representation—are thus made heirs by the law, and not in any representative capacity. We have no particular fault to find with the reasoning of the court as an abstract proposition, in the decision rendered in *McKenzie vs. Bacon*, 40 Ann. 165. The case before us is special. These heirs have, for all we know, as heirs of their father's succession, the very property which was given by their grandparents to their father. We must decline to lay down a rule by which an heir might retain the very property he inherits, and at the same time receive, as an heir, as if he did not own the property at all. He is, to say the least, estopped until he proves that he has not accepted the succession of his father, and received as his own property, which his father received as a gift from the succession of his grandfather. In such a case as here, we must adhere to the opinion in *Succession of Meyer*, 44th Ann. 871.

It follows that this amount of one hundred and ten dollars was properly charged.

We take up the next disputed claim for collation brought against these grandchildren in their own right by their co-heirs. It consists, in the first place, of a charge for board and lodging for twelve years, they allege, for themselves and their father of one thousand dollars. Their father rendered services to their grandfather and grandmother which were fully worth the amount due for his board and lodging. He did some work on the place and was sufficiently useful, while residing with the grandfather and grandmother, to more than equal the value to him of his board and lodging.

His children, the grandchildren here, having lost their mother while they were quite young, were taken and cared for by their grandparents at their home. The evidence shows that the time they remained with their grandparents was less than twelve years. They, besides, worked and assisted in housekeeping not many years after they had been received as just mentioned. The preponderance of the testimony shows that their work was, as to its value, equal to their board and lodging. The District Court correctly allowed five hundred dollars for the care and attention which they received from their grandparents before they were able to work. We think that this is ample compensation. Generally, board and lodging do not give rise to a claim for which fathers and mothers may charge their children. As relates to grandparents, it is different. They are not under the same obligation to provide for

King et als. vs. King and Others.

their grandchildren, and can, therefore, be heard to charge them for actual services rendered.

The plaintiffs ask that these two heirs, Vada and Stella, be made to collate two hundred dollars to the Succession of J. G. King bequeathed to them in the will of J. G. King, their grandfather. These two hundred dollars have been paid to them in accordance with the will which they accepted in satisfaction of all claims against the estate. With reference to the receipt given in full for all claims, we think it evident that they acted in error. This is the trend of the testimony which is uncontradicted and for that reason it does not occur to us that they should be held bound by their receipt.

An examination of the will of the late J. G. King satisfies us that he did not intend this legacy to be an extra portion, but in full payment of all claims which these heirs might have at his death. These heirs having elected to receive as heirs, they must return these two hundred dollars to the mass of the succession and remain content after having received their portion of the succession as heirs.

The plaintiffs seek to recover from the defendant, C. I. L. King, another heir, a larger amount than heretofore allowed by the District Court. The disputed items are a claim made by plaintiffs for a large amount, asserted rental value of property known as the "Swamp place" in Morehouse, cultivated by this heir for a number of years. The defendant claimed as a set-off, taxes and improvements placed on this farm.

The heir, C. I. L. King, said as a witness that before he and his brother stopped paying rent to his father on the Swamp place, the rental paid by him and his brother each year was five hundred dollars. After his father's death it was generally understood that five hundred dollars was a fair rental value. It is just to infer that the property was as valuable each year between the dates before mentioned. On this basis there can be no question that the two thousand dollars demanded by plaintiffs and appellees for rent, prior to J. G. King's death, is not excessive.

Perhaps plaintiffs' argument for a large sum would have great weight were it not that they have fixed the amount at two thousand dollars "or more" in their petition, and asked to have it collated. This heir had cultivated this farm since many years. When the father died he nevertheless bequeathed its use to him for the remainder of his son's life. This and the preponderance of the testimony, it seems to us, warrant the conclusion that the amount at first claimed by plaintiffs is

all that this heir should be required to collate in addition to \$1500 due since J. G. King's death. We do not attach the importance to the words "or more" in the petition plaintiffs seek to have given to them. They are not too vague and indefinite to justify a judgment for a larger sum than that specifically claimed.

The last heir, in the order of the issues as presented, is J. D. King, who should be charged, plaintiffs aver, with the full amount acknowledged in a receipt given to his father. It appears that he signed this receipt for the purpose of shielding his portion of the prospective inheritance from his aged father's succession from the pursuit of his creditors. Although the act was fraudulent and censurable, there is no good reason for it to enure to the benefit of his co-heirs. It did not have the effect of changing the right of inheritance from this heir to his co-heirs. His creditors who are interested would have the right to complain, not the co-heirs. They are without right to become champions of creditors in order to become beneficiaries as heirs.

The items for the rent due to the late father and for property received from him, we think, are sustained by the evidence, and we have found no good reason to increase the amount, but, on the contrary, have found ground to make a reduction of one hundred and eighty-five dollars as follows: rent of Greer place we have reduced to sixty dollars a year; rent of Point place, we have reduced to thirty dollars a year; two mules, value one hundred and twenty dollars, one horse, value ten dollars.

Defendants filed a plea of prescription. In argument, this plea was referred to only in support of the defense of G. L. King against the claim urged by his co-heirs for eight hundred and eighty dollars interest accrued on his note of one thousand dollars. We have noted that this heir admitted having received one thousand dollars and having executed his note therefor which he consented to collate. This admission took the principal and interest out of prescription, even if there ever was any ground for the plea.

Plaintiffs and appellees contend that the testimony of Roberts, husband of one of the parties, and McCreary, was improperly ruled out by the District Court in so far as relates to the other co-heirs; that the rule which excludes the testimony of the husband does not apply to the latter. Be that as it may, if we were to consider this testimony before the court, we have not found after having read the narrative of their testimony annexed to the bill of exceptions that it sustains the contention of these parties. It does not show that a larger amount is

due than heretofore allowed, or that error has been committed in the decree.

The purpose of the law is to maintain equality among the heirs and carry out the intention of the *de cuius*. To maintain the one and establish the other is sometimes attended with considerable work and difficulty when the contention is general among the heirs. It is easy enough to raise issues in the course of settlement of a family account covering a period of years. One conceives the idea that his indebtedness is larger than it should be, another that his co-heir is made to account for less than he should. In all these contentions, courts can only hope to approximate the right and liability of each. Item after item was taken up by the District Court and considered in the light of the testimony. We have also examined and pondered over these items and have arrived at the conclusion that very little change should be made in the judgment.

For these reasons, it is ordered, adjudged, and decreed that the amount to be collated by J. D. King be reduced by one hundred and eighty-five dollars and that the children, Vada King and Stella Johnson, must return the two hundred dollars received by them as a legacy to the mass of the succession, and that another officer than the executor must be appointed to make the sale as auctioneer.

With these amendments, the judgment appealed from is affirmed. Costs of appeal to be paid by appellees, of the lower court by the succession.

ON APPLICATION FOR A REHEARING.

BREAUX, J. We have considered the different grounds urged by the appellants in this case for a rehearing and have found no reason to change our original decree, save in two unimportant particulars which we have determined to make without a rehearing.

1st. We think that J. W. King owes the amount of two hundred dollars claimed by defendants and appellants. In the transcript made part of the record in this case J. W. King, as a witness, referred to this amount as a sum arising from the running of a gin for common account between himself and his father and said that he had years ago realized two hundred dollars as his share of the profits. In the evidence in the last transcript filed, this amount is referred to. Considering the testimony in the first and second transcripts in regard to the ginning, we think that this heir should be charged with these two hundred dollars

2nd. With reference to the costs of appeal in the prior appeal, *i. e.*, No. 13,779, plaintiffs and appellees having failed to maintain the appeal in the former case owe the costs of appeal and in the partition that charge for costs will accordingly be made.

The amounts being small and the court having considered that further argument is unnecessary the amendment to the extent above stated is made.

It is, therefore, ordered, adjudged, and decreed, that our former decree be amended by decreeing that two hundred dollars be charged to J. W. King, and that the account be amended by adding that amount to his debit as an heir in satisfaction of the amount before mentioned. The account of the executor is also amended by charging plaintiffs with the costs of the former appeal, being No. 13,779 on this docket.

With these amendments the judgment heretofore handed down remains, and rehearing is refused.

No. 14,123.

SUCCESSION OF J. T. HEWITT. OPPOSITION OF MRS. JULIA A. HEWITT' TO
FINAL ACCOUNT.

SYLLABUS.

The main contentions of the widow, who opposes the final account of the administrator, that a certain balance of indebtedness is due her and that certain property and credits are placed on the account as pertaining to the separate estate of the husband when the same is community in character, having been negatived by the evidence and denied by the court, the case will not be remanded because of inconsequential errors of debit and credit in the account when it appears certain that it would avail her nothing to so remand and would only result in a useless accumulation of costs.

A PPEAL from the Eleventh Judicial District, Parish of Natchitoches—*Porter, J.*

Norwood T. Smith, for Administrator, Appellee.

Simcoe Walmsley, for Opponent, Appellant.

Succession of Hewitt.

The opinion of the court was delivered by

BLANCHARD, J. Jackson T. Hewitt died in the Parish of Natchitoches, where he resided, in August 1896.

He had formerly been a resident of the Parish of Calcasieu. He removed to Robeline, Natchitoches Parish, in the early part of the year 1893.

He was, when he removed, a man of mature years—a widower with grown children.

In March 1893, he married Mrs. Julia T. Edrington, a widow residing in the town of Robeline.

This lady owned some property at the time of her marriage, the principal part of which was money, to the extent of \$2,000.00, invested in business with McCook & Co., merchants at Robeline.

Shortly after the marriage, a settlement was made with McCook & Co. Mrs. Hewitt owed the firm an account, which was figured into the settlement, and a balance struck of \$1,650.00 as the amount due her, which she drew out, part in cash, part in notes.

This money and the notes passed into the hands of the husband. The notes, it seems, were collected by him, and the whole of the proceeds of the McCook & Co. settlement were reinvested by the husband by loans placed with various parties.

J. T. Hewitt owned considerable property in Calcasieu Parish when he removed from there. Some of it was real estate, some in the form of rights and credits. He had been in mercantile business there with his son-in-law, A. Rigmaiden. The partnership had been dissolved, the business closed, and the balance left over, consisting of some thousands of dollars of assets, were, when Hewitt removed to Natchitoches Parish, left in the hands of Rigmaiden for collection.

He made collections and remitted to Hewitt sums aggregating two thousand dollars or more. This was after Hewitt's marriage to the widow Edrington.

It is also shown that when Hewitt left Calcasieu for Robeline he carried with him in money some twelve or fifteen hundred dollars.

He became at Robeline a money lender. He had his wife's money and his own to operate with.

Neither he, nor his wife, was in any other business during their married life.

Shortly after the husband's death, his son by the former marriage and his son-in-law, Rigmaiden, went from Calcasieu Parish, where

Succession of Hewitt.

they lived, to Robeline to look after the affairs of the dead man, to pay his debts, to settle with the widow, etc. There had been no children born of the second marriage.

Some time later, at the request of the heirs, Rigmaiden opened the succession in Natchitoches Parish and became the administrator.

There was property in three parishes—Natchitoches, Sabine and Calcasieu. Two inventories were taken—one in Natchitoches, the other in Calcasieu. It seems that the effects in Sabine Parish were claims, rights or credits due him there and they were placed on the Calcasieu inventory.

The aggregate of the two inventories was in round numbers about \$3,600.00—a small part community property, the remainder the separate property of the husband.

In 1900 the administrator filed his final account. The widow, who had, meanwhile, removed to Texas, filed oppositions thereto.

Her main contentions are:—that there is a balance due her by the community of \$445.50, which is not recognized by the administrator; that certain items of credits on the inventory and account figure as the separate property of the husband, whereas they are community in character and should be accounted for as such; and that a lot and house in Calcasieu Parish, likewise asserted on the account to be the husband's separate property, also pertains to the community and should be accounted for as such in the settlement.

The trial judge rejected her opposition and homologated the account. He evidently came to the conclusion that there was nothing in the succession for the widow, that she had been settled with to the extent of her just claims, and was without further interest to contest the final account.

She prosecutes this appeal.

Ruling—We are of the same opinion as the district judge.

When the son and son-in-law of the dead man came to Robeline some two weeks after his death, it was not then contemplated to open his succession, but to simply pay his debts, settle with the widow and distribute the balance of his estate among the heirs who were of full age.

The evidence establishes that all the widow claimed at that time was an indebtedness of \$1650.00 due her on account of separate funds, and if she were paid this she would be satisfied. She expressed a willingness to take certain notes found among the papers of the husband, and cer-

Succession of Hewitt.

tain personal property, in settlement of this debt, and she was allowed to do so. These, together with \$20.00 in cash then handed her, aggregated \$1584.75, leaving a balance due her of \$65.25, which the son-in-law sent to her afterwards.

The son and son-in-law testify that they settled with her "just as she requested and at her own figures"; that they made no opposition to anything she suggested or claimed. They are corroborated by J. H. Caldwell, a well known citizen and representative in the legislature, who lives at Robeline and who was present at the settlement.

The widow denies this settlement, but the weight of evidence is against her.

The evidence, too, establishes to our satisfaction that the items of credits placed on the account as the separate property of the estate of the husband are in fact such, as is also the lot and house in Calcasieu Parish, which she claims is community in character.

This lot and house had been acquired some time before his last marriage by J. T. Hewitt, but, for some reason, the title to same had been placed in his son's name. After the marriage the son conveyed the title to him. Having been in fact his property before marriage, and, therefore, *separate* in character, the mere transfer of the title to him by the son after marriage did not suffice to convert it into *community* property.

Besides all this, the community of acquets and gains which existed between the opponent and her dead husband is largely indebted to his estate for separate funds of his own brought into it, and if because of, probably, some inconsequential errors of debit and credit in the account, we were to reverse the judgment and remand the case, it would avail her nothing. In view of this, and of the certainty of uselessly increasing costs, we decline to do it. The community is largely insolvent and it is impossible for the widow to obtain more from it than she has already received.

Judgment affirmed.

No. 14,189.

RAILROAD COMMISSION OF LOUISIANA VS. THE KANSAS CITY SOUTHERN
RAILWAY COMPANY.

SYLLABUS.

The provision of Article 285 of the Constitution, conferring upon this court jurisdiction of suits brought against the Railroad Commission to test the validity of whatever rule, regulation, etc., it may have adopted, cannot be made to apply to suits brought by the Railroad Commission to recover the amount of fines imposed by itself for violations of its ordinances. A suit of the latter kind is an ordinary suit falling within the general rule as to jurisdiction.

A PPEAL from the Twelfth Judicial District, Parish of DeSoto.—
Lee, J.

Walter Guion, Attorney General, (*H. T. Liverman* and *Lewis Guion*,
of Counsel), for Plaintiffs, Appellants.

Alexander & Wilkinson, for Defendant, Appellee.

The opinion of the court was delivered by

PROVOSTY, J. In this suit the Railroad Commission of Louisiana seeks to enforce payment of a fine of \$1000.00 imposed by itself upon the defendant Railway Company, and a motion is made to dismiss the appeal on the ground of want of jurisdiction *ratione materiae*.

As containing a grant of jurisdiction to this court in cases of this character the Attorney General refers to the following Article of the Constitution:

"Art. 285. If any railroad, express, telephone, telegraph, steamboat and other water craft, or sleeping car company, or other party in interest, be dissatisfied with the decision or fixing of any rate, classification, rule, charge, order, act or regulation, adopted by the Commission, such party may file a petition setting forth the cause of objection to such decision, act, rule, rate, charge, classification or order, or to either or to all of them, in a court of competent jurisdiction, at the domicile of the Commission, against said Commission as defendant, and either party to said action may appeal the case to the Supreme Court of the State, without regard to the amount involved, and all such cases, both in the trial and appellate courts, shall be tried sum-

marily, and by preference over all other cases. Such cases may be tried in the court of the first instance, either in chambers or at term time; provided, all such appeals, shall be returned to the Supreme Court within ten days after the decision of the lower court; and where the Commission appeals, no bond shall be required. No bond shall be required of said Commission in any case, nor shall advance costs, or security for costs, be required of the Commission."

That Article, in express terms, has reference exclusively to suits brought *against* the Commission, for the purpose of testing the validity of some action it may have taken; but the Attorney General argues that the provision of this Article on the subject of the appeal, must be read into Article 286 under which the present suit has been brought, the two Articles being laws *in pari materiae*, and having therefore to be construed together.

The canon of construction here invoked is sound; but assuming for argument's sake that Article 285 is *in pari materiae*, the argument loses sight of the fact that there are other Articles in the Constitution which are also laws *in pari materiae*, and in connection with which also Article 286 must be construed; these are the Articles inserted in the Constitution for the special purpose of regulating the jurisdiction of this court, which impliedly prohibits this court from entertaining jurisdiction of cases involving a mere monied demand where the amount is less than \$2000.00,

We can readily understand why suits brought to test the validity of any rule, regulation, etc., that the Commission may have made, should go to the highest court, which alone is competent to give a decision that shall be authoritative in other cases besides the one in which it is rendered; but after the validity of these rules, regulations, etc., have been established, either by decision or by failure to contest, we can think of no special reason why suits brought to collect fines imposed under these rules and regulations, should come to this court, any more than should any other suits brought by the State, or by any of the State agencies, for the recovery of mere money, and involving no governmental regulation.

We have no jurisdiction of the appeal, and have to sustain the motion to dismiss; but in doing so we will add that the case, being the first of its kind, is one in which we should entertain an application for a writ of review on the petition of either party; so that no permanent injury to either party can result from our present action.

Appeal dismissed.

No. 14,336.

STATE OF LOUISIANA VS. ALEXIS SENEGAL.

SYLLABUS.

There is no error in a refusal to charge that "Where a man finds his wife committing adultery with a man, and, provoked by the wrong, instantly kills the adulterer, the homicide is only manslaughter." But, if it were otherwise, the accused, in this case, having been convicted only of manslaughter, could have sustained no injury

A PPEAL from the sixteenth judicial district, parish of St. Landry—
Lewis, J.

Walter Guion, Attorney General, *R. Lee Garland*, District Attorney
(*Lewis Guion*, of counsel), for Plaintiff, Appellee.

Veazy & Pavy, for Defendant, Appellant.

The opinion of the court was delivered by

MONROE, J. The defendant in this case was tried for murder and convicted of manslaughter, and he has appealed from the sentence imposed. The case comes up on a bill of exceptions to the refusal of the trial judge to give the following special charge: "Where a man finds his wife committing adultery with a man, and, provoked by the wrong, instantly kills the adulterer, the homicide is only manslaughter." It appears from the bill that the judge refused so specially to charge, on the ground, among others, "That the jury had been previously fully charged as to the difference between murder and manslaughter and as to the provocation reducing the grade of the homicide. The requested charge is too broad; it being a question of fact for the jury to determine whether such act is, or was, sufficient provocation to preclude the presumption of malice. The law writers cite the given case as an example, as provocation sufficient to reduce the grade of the homicide, but not as a proposition of law. Even though there may have been error in refusing the requested charge, it is error without prejudice and the conviction should not be set aside."

The charge was properly refused; but, as the accused was convicted only of manslaughter, he would have sustained no injury if there had been error in the refusal. *State vs. Tomkins*, 32 Ann. 621.

Judgment affirmed.

No. 13,964.

107 453
114 563

MRS. FELICIA POZO, WIFE OF JAMES H. CONNOR, vs. JAMES H. CONNOR,
HER HUSBAND.

SYLLABUS.

To warrant in Louisiana a judgment of separation from bed and board between married persons, the grounds assigned and proved must be of a very serious character. Light differences between the spouses will not suffice.

A PPEAL from the Civil District Court, Parish of Orleans.—
Theard, J.

Robert J. Maloney, for Plaintiff, Appellant.

Clegg & Quintero, for Defendant, Appellee.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff, by direct action, and the defendant, in reconvention, each prayed, in the District Court, for a separation from bed and board from the other. The court rejected both demands and the plaintiff appealed.

The judgment appealed from was correct. The court could have reached no other conclusion under the evidence. The parties have, neither of them, acted in such a manner as to justify a judicial separation, and there has been nothing in the conduct of either which would or should prevent, after calm reflection and consideration of the duty which husbands and wives not only owe to each other, but to their young children, the reunion of these parties. The law intentionally leaves open a way for reconciliation even after a judicial separation.

Decrees of separation and divorce are granted with reluctance.

For the reasons assigned, it is ordered, adjudged and decreed, that the judgment appealed from be and the same is hereby affirmed, with costs.

Rehearing refused.

No. 14,322.

STATE OF LOUISIANA VS. MARCEL BOULINE.

SYLLABUS.

1. In the motion in arrest of judgment, the defendant averred, without reference to any particular ruling of the District Court, that errors had been committed prejudicial to his defense. It is settled by repeated decisions that in a motion in arrest of judgment, in order to be entitled to relief, the defendant must set forth the errors the record shows to his prejudice.
2. Although this is the well settled rule, the court examined the record and found no error falling within the scope of a motion in arrest of judgment.
3. It is within the discretion of the court *a quo* after verdict and after the filing of a motion in arrest of judgment to order, in the presence of the defendant, in open court, the minutes to be corrected and made to correspond with the facts of the case. The record does not show that the facts of the case were not as stated in the minutes.

‘A PPEAL from the Nineteenth Judicial District, Parish of St. Martin.—*Foster, J.*

Walter Guion, Attorney General, *Anthony N. Muller*, District Attorney (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Edward Simon, for Defendant, Appellant.

The opinion of the court was delivered by

BREAUX, J. Appellant was tried and convicted upon an indictment charging him with having attempted to commit rape upon a child nine years old. By the verdict of the jury and the judgment of the court, the defendant was found guilty and condemned to serve at hard labor in the penitentiary for ten years. The indictment was written in the usual form.

The minutes of the court show that, in open court, in the presence of the accused and his counsel and before sentence, the District Attorney presented a motion to have the minutes of the 17th and 20th of January, 1902, corrected so that they would conform with the facts, which the motion averred were within the knowledge of the judge

presiding. The motion was sustained and the minutes of the court were accordingly corrected.

Counsel for the defendant presented a motion in arrest of judgment in which he alleged that it was apparent on the face of the records and minutes of the court that "the indispensable requirements of law during the trial of said case have not been complied with." The court *a qua* overruled this motion on the ground that it failed "to set forth" wherein the indispensable requirements of the law are wanting or appear as lacking on the face of the papers, citing 40 Ann. State vs. Dorsey, p. 739, which decided, as stated in the *syllabus*, that "the motion in arrest of judgment should concisely state the defects complained of."

In addition to the foregoing bill just noted the defendant presented a second bill to the ruling of the judge in allowing the minutes to be corrected in accordance with the facts within his knowledge.

We return for a moment to the motion of defendant made in arrest of judgment. We have not found that the district judge erred in overruling this motion. It is well settled by a number of decisions that a motion in arrest of judgment must point out the errors charged. State vs. Malone, 37 Ann. 266. The error must plainly appear. State vs. Posey, 105 La. 350.

We take up the second bill of exception before noted for decision. It was taken to the court's ruling in allowing a correction of the minutes to be made. We have considered the correction ordered to be made by the court. They were not errors of substance and could be corrected as was done. The court has the right to correct the minutes of its proceedings conformably with the facts as they occurred. The truth of the entry was not questioned. It was urged that the corrections had been made too late in the trial. The correction complained of could be made after the motion in arrest of judgment had been filed. "When the record fails to show that the defendant was present during the trial, the record may be amended so as to supply the omission." State vs. Marceaux, 48 Ann. 101. After motion in arrest had been overruled, this correction may be ordered. State vs. Posey, 105 La. 351.

The other corrections were of minor importance and related to facts arising, to the court's knowledge, in the course of the trial, which the record sets forth, and we think are clearly within the rule laid down

in *State vs. Daniels*, 49 Ann. 954; *State vs. Butler*, 48 Ann. 1191. The view we have taken of the case leaves us no alternative save to affirm the judgment.

For the reasons assigned the judgment of the district court is affirmed.

No. 13,852.

SUCCESSION OF MRS. BRIDGET MANNING, AND MRS. MARY MANNING, ET AL.
VS. JOHN BURKE, INDIVIDUALLY AND AS TESTAMENTARY EXECUTOR,
ET ALS. (CONSOLIDATED.)

SYLLABUS.

1. All property of whatsoever kind whether standing in the name of the husband, or that of the wife, or in their joint names, is presumed by the law to be community in character.
2. Even the earnings of the wife's industry and labor fall into the community.
3. And where a married woman, not separate in property, is engaged in trade, she is presumed, in the absence of proof to the contrary, to trade on the funds of the community and the assets in her hands are those of the community.
4. The legal presumption in favor of the community dispenses those claiming community rights or asserting community obligations from other proof, and it is incumbent on those denying the community and asserting the property or funds to be the separate estate of the wife to prove *affirmatively* and *satisfactorily* that the same is hers.

A PPEAL from the Civil District Court, Parish of Orleans—*Somerville, J.*

James B. Rosser, Jun., for Mrs. Mary Manning, wife of John P. Jones, and Miss Catherine Manning, opponents, Appellees.

McCloskey & Benedict, for Mrs. Kate Concaugh, Miss Kate McLaughlin, William McLaughlin and Francis Tomeny, Legatees, Opponents, Appellants.

Edgar M. Cahn and *Richard B. Otero*, for John Burke, Mrs. John

Succession of Manning vs. Burke.

Burke, James Burke, St. Peter and Paul's Church, Appellants, and John Burke, Testamentary Executor, etc., *et al.*, Appellees.

The opinion of the court was delivered by

BLANCHARD, J. This is a contest over a sum of money which was on deposit with the mercantile firm of Schmidt & Zeigler on the 30th of November 1893, at which time Patrick Manning died.

The money was on deposit in the name of Mrs. Bridget Manning, who was the wife of Patrick Manning. The marriage between them had taken place in May 1860.

When Patrick Manning died no steps were taken to open his succession. No property was standing in his name and there was no will.

His widow survived him about a year and a half, departing this life in June 1900.

After the death of her husband she drew \$550.00 of the funds on deposit with Schmidt & Zeigler, and for the remainder, \$3,500.00, a new certificate of deposit was issued to her, dated January 3, 1899.

This certificate was in her possession at the time of her death. No other property was then standing in her name except a cemetery lot and tomb.

She left a last will and testament wherein she made bequests to her nephews and nieces and to others, and named John Burke, her nephew, as testamentary executor, with seizin and without bond. The tomb she willed to John Burke, and she also designated him as residuary legatee.

She treated the money on deposit as hers individually, to be disposed of as she thought fit.

There had been no children of the marriage between herself and Patrick Manning. Neither left at death either descendants or ascendants.

The will of Bridget Manning was probated and John Burke qualified as executor. There were practically no debts.

Those named as legatees in the will claim under that instrument, and their contention is that the money on deposit with Schmidt & Zeigler was the separate, paraphernal property of the testatrix.

Mary Manning (wife of John P. Jones) and her sister Catherine Manning were the nieces and are the only heirs at law of Patrick Manning.

They contend the money on deposit with Schmidt & Zeigler at the time of their uncle's death was community property and that the one-

half thereof is inherited by them as his heirs. They make the same claim to the cemetery lot and tomb.

They instituted a separate suit asserting this contention, but the same was consolidated with the mortuary proceeding in the Succession of Bridget Manning, and the issue between themselves and the claimants under the will was tried there.

A final account was filed by the executor, making distribution of the \$3500.00 which was on deposit with Schmidt & Zeigler when Bridget Manning died, but which the executor had withdrawn and placed in bank.

Various oppositions were filed. Among them, one by certain of the special legatees opposing the fees of the attorneys of the executor placed on the account at \$750.00, and opposing the claim of John Burke and wife placed on the account as creditors for \$500.00 for nursing the deceased and attendance upon her in her last illness. Another by Mary and Catherine Manning asserting their claims as heirs of Patrick Manning—the same as set up in their separate suit.

From the judgment rendered on these oppositions the legatees under the will, and John Burke and wife appealed.

In this court, however, John Burke and wife have, by plea, discontinued their appeal so far as their claim for nursing and attendance is concerned—maintaining it in other respects.

Neither the executor or his attorneys appeal, though both file answers here to the appeal.

In this court the issues are, by the pleadings and briefs, narrowed to the following:—

1st. The claim of the heirs of Patrick Manning for one-half of the estate standing in the wife's name, predicated on the presumption that it is a community asset.

2nd. The fees of the attorneys of the executor.

I.

The heirs of the husband assert that the community estate consists of \$4,050.00. This is made up by the \$3,500.00 on hand when Bridget Manning died and the \$550.00 which she drew out, of the moneys on deposit with Schmidt & Zeigler, after the death of her husband.

Their contention is that half of this sum, or \$2,025.00, is due them.

The trial Judge sustained them in this, with the exception that he held the funeral expenses of Patrick Manning should be deducted from

Succession of Manning vs. Burke.

their share. This left as a balance \$1822.00 for which he gave them judgment.

We think this ruling correct.

The community of acquets and gains existed between Patrick Manning and his wife. There had been no separation of property.

At the time of the dissolution of a marriage all effects which both husband and wife reciprocally possess are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

This is the language of C. C. 2405.

Under the law, therefore, all property of whatsoever kind, whether standing in the name of the husband, or that of the wife, or in their joint names, is presumed to be community in character.

Even the earnings of the wife's industry and labor fall into the community.

Isaacson vs. Mentz, 33 La. Ann. 595; Ford vs. Brooks, 35 La. Ann. 157; Knight vs. Kaufman, 105 La. 35.

And when a married woman, not separate in property, is engaged in trade, she is presumed, in the absence of proof to the contrary, to trade on the funds of the community and the assets in her hands are those of the community. Pendergast vs. Cassidy, 8 La. Ann. 96.

The burden was on the heirs of the wife to show that the funds in question pertained to her separate estate, and not to the community.

The legal presumption in favor of the heirs of the husband dispensed them from all other proof (C. C. 2287), though the record shows they did not rest upon this exclusively.

It was incumbent on the heirs of the wife to show *affirmatively* that the money claimed was hers. Succession of Coste, 43 La. Ann. 144. They were required to show that the wife had means and their origin, and the actual investment of same—in this case the actual deposit of same (her separate money) with Schmidt & Zeigler.

The proof shows that the account of deposit of moneys with Schmidt & Zeigler by the wife was not opened until some twelve or thirteen years after her marriage. It began with a deposit of \$300.00 in July 1873, and was increased by other deposits and interest until it reached the sum of \$4,050.00.

The fact that the wife had \$800.00, antenuptial earnings, at the time of her marriage, does not even suffice to raise a presumption that any

part of it went to make up the deposits with Schmidt & Zegler begun more than a dozen years later.

Nor is it shown that the \$800.00 which the wife owned at marriage was received by her husband. Neither his estate nor that of the community can, therefore, be charged with it.

The presumption of law being that the money in question was community funds, and the *onus* being on the wife's legatees to rebut this and to show it was her separate property, the question whether it was or not becomes one of fact.

On this issue of fact the conclusion of the trial Judge was adverse to the legatees. Our consideration of the testimony and appreciation of its value has led us to a like conclusion. It would subserve no useful purpose to enter upon a discussion of the evidence, especially so since that is done in a written opinion of our learned brother of the District Court, which is found in the record.

The cemetery lot was bought and the tomb erected after the dissolution of the community. It was willed by Mrs. Manning to John Burke and this bequest was rightly sustained. The heirs of the husband have no just claim to it.

II.

With regard to the fees of the attorneys of the executor, the charge of \$750.00 against an estate inventoried at only \$3,500.00 is excessive. The trial Judge reduced it to \$300.00. There is no demand made here to reduce it below this figure.

This fee must be held a charge against the half of the funds pertaining to the legatees. It was earned in the main in resisting in their behalf the demand of the heirs of the husband. There having been no debts of the community and none against the separate estate of Patrick Manning, there was no reason in burdening the community estate or his estate with the expenses of an administration. The will of the dead wife could operate only on her share of the community funds, and its probate and execution enured only to the benefit of her legatees and the creditors of her succession.

Judgment affirmed.

No. 13,850.

PETER McCORKLE vs. ANHEUSER-BUSCH BREWING ASSOCIATION.

SYLLABUS.

A street car, propelled by electricity and moving at a moderate speed, is run into at a corner by a covered beer wagon, the driver of which, occupying a seat from which his view upon either side is obstructed by the cover of the wagon, drives his mules at a brisk pace along the street which intersects the car tracks, and practically into the car, before looking up or down the track: *held*, upon the facts proven, the driver was at fault and the motorman is entitled to recover from the driver's employer for personal injuries resulting from the collision.

A PPEAL from the Civil District Court, Parish of Orleans.--
King, J.

Denegre, Blair & Denegre, for Plaintiff, Appellee.

Chaffe & Bowers, for Defendant, Appellant.

The opinion of the court was delivered by

MONROE, J. This is an action in damages for personal injuries. The defense is a general denial and "contributory negligence."

The facts, as disclosed by the record, are: That, on a clear day in May, about half-past nine o'clock in the morning, the plaintiff, as motorman, was taking a street car up Hurst street. When he passed the corner of Webster street, which is the third corner from the terminus of the line, he shut off the power and gave a turn to his brake, preparatory to the stop which he was soon to make, and, before he reached the next corner, the speed of the car had been reduced to, probably, six miles an hour. The next corner was the intersection of Henry Clay avenue, along which, Stephen Girod, a driver employed by the defendant corporation, from his seat, in the wagon to which they were attached, was driving a pair of mules. By reason of the position of his seat and the cover of the wagon, the driver could not see to the one side or the other without leaning forward. Several witnesses testify that the mules were moving very rapidly, and we are satisfied that the pace was at least equal to a brisk trot. As the wagon approached Hurst street, the car of which plaintiff had

charge was approaching the same corner upon that one of the two tracks on that street which lies nearest to St. Charles avenue, from which direction the wagon was coming. Upon the particular corner which intervened between the two vehicles there was a frame building with a shed which extended over the banquette, so that, under the most favorable circumstances, the two actors in the affair could not have seen each other until they were almost in collision; and, as we have stated, the driver labored under the further disadvantage of having his view upon either side cut off by the cover of the wagon. The evidence satisfies us that the motorman was ringing his bell and that the failure of the driver to hear it was attributable either to the fact that the sound was drowned by the noise made by the wagon and mules, or, as is more likely, that his thoughts were otherwise engaged. However that may be, he drove straight on, into Hurst street, and was entirely oblivious of the approach of the car until a collision was inevitable, notwithstanding his best efforts and those of the motorman to prevent it. The result of the collision was, that the front of the car was badly smashed by the pole of the wagon, which also broke the collarbone and jaw of the motorman, made an ugly hole, several inches in depth, in his shoulder and otherwise bruised and injured him, so that he was laid up at home for three weeks and was unable to return to his work for seven weeks. We think it unnecessary to recapitulate in detail the testimony of the various witnesses who were examined. A lady, who was nearer to the scene of the accident than any one else, being but a few feet away, testifies that she was walking along Henry Clay avenue, towards, and very near, the corner of Hurst street, when the wagon passed her, and that, observing the rapidity with which the mules were moving, and hearing the bell of the approaching car, and, as we understand her, by that time, seeing the car, she attempted to attract the attention of the driver by screaming and waving her arms, and that, then, realizing that a collision was about to occur, she closed her eyes. The driver himself testifies in part as follows:

"Q. Did you look for the car when you got to the corner? A. When I got far enough with the building, I looked up and down the street and the car was on top of me. Q. You looked up and down the street and the car was on top of you? A. Yes, sir; I leaned out of my wagon, it was too late, and the car was on top of me." He testifies that it was his intention to have turned down Hurst street, in the direction from which the car was approaching, and he was asked how

far he was from the car track when he started to turn, to which he replied. "The mules were near on the track when I started to make the turn. I was sitting twelve feet behind the pole. I heard no bell or nothing, and I started to pull my mules around, and by the time I started to make the turn they were pretty well on the track." The pole, it may be remarked, is shown to have been ten feet long, and the witness, no doubt, means that his seat was twelve feet behind the forward end, but just how far back in the wagon that placed him does not appear. He further testifies: "Then you did not see the car coming until after you attempted to make the turn? A. No, sir; I did not hear no bell or anything. Q. You didn't attempt to make the turn until the mules were almost on the track, you say? A. Yes, sir. Q. Then you hadn't seen the car when your mules had almost reached the track? A. No, sir; I hadn't seen it or heard it." He also testifies that he slacked his speed only when he started to make the turn, and, from other testimony, we think it doubtful whether he did so even then. Beyond this it may be stated that neither the driver, the mules, nor the wagon, received any injury, and that the car was stopped by the time the forward end reached the upper crossing of Henry Clay avenue.

Upon this showing, we are of opinion that the driver was at fault, that the motorman was not, and that the latter is entitled to recover. The judge *a quo* allowed him \$750, and he asks that the amount be increased. We think, however, that we should defer to the opinion of the trial judge, although if he had allowed the plaintiff a somewhat larger amount this judgment would likewise have been affirmed.

Judgment affirmed.

No. 14,095.

MRS. MARY L. MERCHANT ET ALS. VS. THE PINE WOODS LUMBER CO.

107 463
121 513

SYLLABUS.

1. The employer is not responsible in damages to a workman or to his legal representatives for injuries suffered from a danger that was plain and open to view and easily avoided with ordinary care, and that the workman was well acquainted with.
2. The risk of injury from such a danger is assumed by the workman as incident to his employment.

A PPEAL from the Second Judicial District, Parish of Webster—
Watkins, J.

Stewart & Stewart, for Plaintiffs, Appellees.

Wise & Herndon, L. K. Watkins, and Henry Moore, for Defendant,
Appellant.

The opinion of the court was delivered by

PROVOSTY, J. James L. Merchant, while employed at the sawmill of the defendant company, met with an accident resulting in his death; and his widow, for herself and as guardian of her minor child, issue of her marriage with the deceased, brings this action in damages, alleging that the accident occurred through the fault of defendant in putting the deceased to work in a dangerous place without warning him of the danger.

The defense is that the danger, such as it was, was in plain, open view and easily avoided by due care; and that what risk there was, was assumed by the deceased as incident to his employment.

For conveying lumber from the mill to the dry-house there is at defendant's sawmill a structure resembling somewhat a railroad bridge and built after the same fashion, that is, of open work of heavy timbers, mainly trestles and cross-beams. This structure is about twenty feet high and one hundred and fifty to two hundred feet long; and, viewed from the side, appears to have—in the language of the witnesses—two “decks,” one at the top, and one about midway from the ground. Standing on this lower “deck,” a person finds himself in a passageway extending the entire length of the structure and four feet wide by five to six feet high. On each side he has the open, bridge-like work. Overhead, he has a floor, and above that the carrier, or moving platform, running the entire length of the structure. At his feet, along the passageway, he has an iron shaft; and on one side of this shaft, at right angles to it, he has at every forty feet a short cross-shaft; this cross-shaft ends in a beveled cogwheel, which fits into a similar beveled cogwheel affixed to the longitudinal shaft. Affixed to this cross-shaft, about nine inches from the cogwheel, is a sprocket wheel, by means of which and of a chain band the motive power is transmitted to the live rollers that are under and that propel the carrier overhead. By way of surface to walk on he has alongside of the longitudinal shaft, and

resting on the same cross-beams as it, a twelve-inch plank on one side, and a six by eight timber on the other side. The cross-shafts rest on this timber.

It having been found advisable to remove the floor described as being just below the carrier and overhead of a person standing on the lower "deck," the deceased was assigned to the work. He was to saw off the boards composing the floor, and might do the work from a position on the top of the structure, sawing down, or by standing on the lower deck and sawing up; he chose, or was told to adopt, the latter method; and he had sawed to a distance of six feet nine inches when the accident happened. His leg got caught at or just below the knee between the cogwheels and was crushed and mangled up to the body.

No one saw the accident. The man in charge of the machinery, feeling a jar and hearing a scream, stopped the machinery. He and the engineer, Tom Tramwell, were the first to reach the deceased. They found him held fast in the cogwheels, and apparently sitting on them. "My God," exclaimed Tramwell, "how did you come to get here?" "I stepped backward and it caught me," answered the deceased. The casualty occurred at about eleven o'clock in the morning, and the deceased died at about nine o'clock of the evening of the same day.

At the thought of a fellow man being subjected to such excruciating pain one grows faint; and in the wake of this feeling comes a feeling of sympathy for his widowed wife and orphaned child; but, though we hold the defendant to the strictest legal accountability, the plaintiff cannot recover. To decide for plaintiff we should have to adopt the doctrine that every workman who gets hurt by dangerous machinery while doing his work, is entitled to damages from his employer. The rule of law is very different; it requires that the employer should have been at fault, and not merely that he should have employed the workman to work near dangerous machinery.

The testimony is about evenly balanced as to whether the work which deceased was required to do was more dangerous than any other employment close to dangerous machinery. For our part, we do not see why these cogwheels of twelve to fourteen inches diameter and seven inches thickness or this revolving shaft, or this circling chain band, or the combination of all three, should be considered necessarily dangerous, when there was ample space to stand out of their reach; nor can we see why a twelve-inch plank, or a six or eight-inch timber, should not be secure footing to a workman, even when in the act of sawing overhead.

The case is not that of a green hand exposed to unsuspected danger; the deceased was 22 to 25 years old, in the full possession of all his faculties, was perfectly familiar with the ins and outs of the place—having run the carrier during three days, and oiled the machinery, including the fatal cogs, several times, and spent the day before that of the accident in cleaning out the sawdust and trash from under the carrier; and the work was carpenter's work, which kind of work he had been doing about the premises; and the cogs were in plain, open view.

Also it is notable that when the accident happened the deceased had already sawed to a point eight feet nine inches away from the cogs, so that to get into the cogs he had to leave off sawing and step to them. Therefore the direct immediate cause of the accident was not the difficulty of sawing without getting into the cogs, but the thoughtlessness of the deceased who put his limb or his trousers within the bite of the cogs.

There was danger—the event has but too cruelly demonstrated that fact—none, however, but such as was plainly visible and known to the deceased, and such as he assumed the risk of. *Smith vs. Seellers*, 40 Ann. 527; *Dandie vs. South. Pac. R. R.*, 42 Ann. 686.

It is therefore ordered, adjudged and decreed that the verdict of the jury and the judgment of the lower court in this case be set aside and that this case be dismissed at the costs of the plaintiff in both courts.

Rehearing refused.

No. 14,181.

SUCCESSION OF ALICE JONES WELLER.

SYLLABUS.

1. In interpreting a last will and testament, effect must be given to the words of the bequest, "to be his as long as he lives."
2. The clause is not attacked by the heirs, and the legatee, on the other hand, asks for its enforcement as being absolute and unrestricted.
3. When it becomes necessary to treat with the subject of life estate, it is possible, consistently with jurisprudence, to safeguard interests by requiring compliance with the laws relative to usufruct.

Succession of Weller.

4. Security to secure the return of the property may be required of the usufructuary, which, however, cannot be made to operate as a hinderance to the enjoyment of the property, for the usufructuary is entitled to the revenues resulting, after having complied with the articles of the Code on the subject, even though he may not have furnished security.
5. The one treated as usufructuary cannot be required to pay the debts of the succession before going into possession and enjoying the usufruct.

A PPEAL from the First Judicial District, Parish of Caddo.—
Land, J.

Holbert & Barret and Leonard, Randolph & Rendall, for Opponents, Appellees.

Leon B. Smith, for Legatee, Appellant.

The opinion of the court was delivered by

BREAUX, J. The interpretation of a will is at issue. The testatrix, Alice Jones Weller, departed this life at Butte, Montana, on the seventh of December, 1901. The following is her testament:

"All my property which is situated in Shreveport, La., consisting of two lots on Spring street of the Jones subdivision, their numbers being, as well as I remember, 5 and 8, and all the improvements thereon, which are cottages 931 and 1015 Spring street, including cisterns, I will, and bequeath to my husband Marshall Weller having been and being my best friend and only protector. Should I at any time pass away in a foreign State, it is my desire that this will which is written in my own handwriting, to be carried out to the very letter and my possessions, both in Shreveport or any that I may be fortunate to possess afterwards or in any other State, I will and bequeath to Marshall Weller to be his so long as he lives.

"This is my last will and testimony which is written by my own free will and consent and at my own suggestion, and by no dictation from other parties.

"God is my judge and only witness. Should I pass away before my husband, Marshall Weller, then this will to be carried out as written."

The contention of the heirs of the late Mrs. Weller, consisting of her brothers and sisters or their representative, is that under the will her husband, Marshall Weller is entitled to the property during his life and at his death it passes to them as owners. In other words that

they are owners of the fee simple and that he has only the usufruct of the property. While on the other hand, the contention of the learned counsel for the husband is that her purpose was solely to give "her all" to the husband to the exclusion of her indifferent relations.

We are informed by the argument that the testatrix was a lady of much simplicity and gentleness of character; that she left her home in Shreveport alone in the summer of 1901, going to the West in search of a new home and that while in Denver she met Marshall Weller to whom she was married in July of that year. She lived about two months after her marriage. She made her will early in August and died suddenly in September following. After her death the will was produced by the husband.

It was presented for probate, evidence was heard, and it was admitted to probate and order was issued for its execution according to its terms which were interpreted to be as follows: That under the will the husband, Marshall Weller, is entitled to the use of the property of the testatrix and his claim as owner was rejected and the heirs at law of Mrs. Alice Weller named in the judgment were recognized as the owners of the property in the proportion stated.

The husband was authorized to take possession of the property upon paying the debts of the deceased and furnishing bond in amount set forth. From this judgment, the husband has taken this appeal.

Unquestionably the clear intention of the testatrix should prevail. If we were warranted to stop after having considered the first clause of the will bequeathing all of her property to her husband, the intention would be evident enough. As interpreters of the will, we are not at liberty to confine our analysis to the first clause. A consideration of the entire text is necessary in order to arrive at the intention.

The protection and friendship of the husband, as declared by the wife in her will a few weeks after her marriage, adds little one way or the other to the clauses of the will, for it can as well be said that she bequeathed the usufruct to him because of his friendship and protection as to say that on that account she intended to give him the ownership absolutely. Her acquaintance with him was of a comparatively recent date. There is no such evidence in the record as to give rise to an unavoidable inference of a determination on her part to completely disinherit her brothers and sisters or their descendants.

The words employed by her, the property to be his "so long as he

Succession of Weller.

lives," have a distinct meaning to which she in concluding adds force by expressing the wish that "this will be carried out as written. "Applying the general rules of interpretation and construction, the ownership was only partial in that it was expressly limited to the life of the legatee. We are led to believe that she understood the meaning of words. She would not have limited her gift had it not been her intention. The will must be construed and taken as written. *Ball vs. Executors*, 40 Ann. 284.

We have carefully considered the jurisprudence of this court upon the subject. It has been decided that an estate for life is not an usufruct. The question was passed upon by a divided court. Imperfect ownership was treated as a distinct right of property in the thing transferred. Reasoning from this premise, the court arrived at the conclusion that the will contained a substitution and considered as null the clause bequeathing an imperfect right. The right of the heirs as owners was recognized. *Marshall vs. Pearce*, 35th Ann. 558. The clause construed as a substitution was annulled in the cases of *Provost vs. Provost*, 13 Ann. 574; *Anderson vs. Pike*, 29th Ann. 120.

There is no question but that a will by which property is devised to one and at his death to another involves a prohibited substitution which avoids the devise.

In the case before us for decision the clause, as we take it, is not particularly attacked. The husband, of course, does not attack the clause, which he seeks to invest it with *post mortem* effect disinheriting the heirs, while, on the other hand, learned counsel representing the heirs set forth that they are not unmindful of the fact that they could have urged with much force that the will contains a prohibited substitution, but that they were mindful of the further fact that the law prefers at all times a principle of construction that will prevent total intestacy, a principle which found its origin in Roman law. They, for that reason, did not seek to have the claim decreed null.

In view of the terms of the will we would not be warranted in holding that the husband is the unqualified legatee of the testatrix, and on the other hand we can imagine no good reason not to adopt an interpretation which will give effect to the wishes of the testatrix.

This brings us to the subject of usufruct. The imperfect ownership growing out of the restrictions of the right to a life tenure of property has, as we think, no place in the laws of this State, unless it is to be considered in the light of an usufruct.

Imperfect ownership gives the right of enjoyment and even of disposal when it can be done without injury to the rights of others, that is "those who may have real or other rights to exercise upon the same property." In *Matter of Morgan R. R. Co.*, 32 Ann. 371. C. C. 492. This right of others can be safeguarded by enforcing laws relating to usufruct.

The legatee's contention is that if one is unable to give the required bond he may not derive the enjoyment to which he has a right. The law has gone as far as possible in that event to protect the rights of the usufructuary by providing for investment on his failure to give bond. C. C. 563.

Lastly, with reference to the debts which the usufructuary has been condemned to pay in the judgment before taking possession, this is a matter of advance, if not made by the usufructuary, the heir has the choice of making it or to sell part of the property. C. C. 585. The usufructuary would have all right on the remainder after a sale to pay debts, but he cannot as a condition be required to pay the debts.

Before concluding, we wish to refer to one of the decisions cited to by counsel for Weller in which the *syllabus* seems to have bearing. *Succession of Justus*, 45th Ann. 190. We have examined the record and find that there was a question of prohibited substitution involved which was not pressed. The *syllabus* is not sustained by the text although in strict accord with the views expressed by this court in preceding decisions to which we referred *supra* (i. e., 34th Ann. 558, and the decisions referred to in that opinion) in connection with which the *syllabus* is to read.

The judgment appealed from is amended by striking therefrom the following: "The husband is authorized to take possession of the property upon paying the debts of the deceased."

As amended, the judgment is affirmed at appellee's costs.

BANCHARD, J., takes no part.

LEWIS W. LYONS VS. DANIEL S. CARROLL.

SYLLABUS.

1. Where three defendants are sued for damages for false imprisonment and malicious prosecution, and the suit is dismissed as to two of them, who are police officers, on exception of no cause of action, it is the case against them *as presented by the petition* which must be considered in determining the correctness *vel non* of the judgment of dismissal—not the case as developed by the evidence on the trial of the merits as to the other defendant.
2. If, *from the petition* it appears that the officers of the law acted on probable cause in arresting the plaintiff, then no cause of action as to them is disclosed, and the judgment of dismissal must be sustained, notwithstanding on the trial of the merits, as to the other defendant, it develops such defendant did not instigate the arrest and the officers acted without probable cause.
3. Those who honestly seek the enforcement of law and the administration of justice, and who are supported by circumstances sufficiently strong to warrant a cautious man in the belief that the party suspected may be guilty of the offense charged, should not be made unduly apprehensive that they will be held answerable in damages.

A PPEAL from the Civil District Court, Parish of Orleans.—
Ellis, J.

Gurley & Mellen, for Plaintiff, Appellant.

Ambrose Smith, for Defendant, Appellee.

The opinion of the court was delivered by

BLANCHARD, J. Plaintiff sued Daniel S. Carroll, Richard H. Kerwin and Ferdinand DeRance for damages caused by his illegal arrest and imprisonment on a charge of larceny.

The thing alleged to have been stolen was a diamond stud taken from the shirt front of Carroll while drinking with several persons in a saloon.

The loss was reported to the police, who obtained the names of five or six persons with whom Carroll had kept company the night the diamond stud was stolen, among them that of plaintiff, though, it developed the latter was not with him at the time the jewel was taken.

Kerwin and DeRance were detective officers of the police force, and it was they who arrested the plaintiff. The arrest was made on suspicion and without warrant.

All the defendants filed exceptions of no cause of action, which the trial court sustained in so far as Kerwin and DeRance were concerned and dismissed the suit as to them.

From this judgment of dismissal the present appeal is prosecuted.

The exception referred to was overruled as to defendant Carroll and the case against him proceeded to trial, with the result that there was judgment in his favor, rejecting the demand of the plaintiff, and this judgment was, on appeal here, affirmed. See 51 La. Ann. 1542.

The ground upon which the trial court and this court relieved Carroll of liability for damages was that it was not proven he had instigated the prosecution and that he had caused plaintiff's imprisonment.

With reference to the charge of larceny made against the plaintiff, the trial court declared he was wholly innocent of the theft of the diamond; that he was the victim of circumstances; like poor Troy he had been in bad company.

With reference to the same charge this court went even further. It declared not only that the plaintiff was entirely innocent, but that he was absolutely blameless, that there was no probable cause justifying action against him, that the officers committed an error in taking him into custody, and that his arrest was solely their act and was not done at the instance of Carroll.

On these conclusions thus judicially arrived at as the result of the trial of the case against Carroll, it would seem to follow that if plaintiff had no case against Carroll, he ought to have one against the two detective officers, Kerwin and DeRance, who are found by the opinion of the court to have acted without probable cause in arresting and imprisoning him.

But it must be remembered that the dismissal of the suit as to them was on their exception of no cause of action, which was tried on the face of the petition and before the case as to Carroll was tried on its merits.

Therefore, it is the case *as presented by the petition* against Kerwin and DeRance which must be considered in determining the correctness *vel non* of the judgment of dismissal— not the case *as developed by the evidence on the trial on the merits against Carroll*.

If, from the petition, it appears that the officers of the law acted on probable cause in arresting the plaintiff, then no cause of action as to them is disclosed, and the judgment appealed from must be sustained.

This is admitted by plaintiff's counsel in their brief who say:—

It is elementary that an officer has no right to arrest a person for a misdemeanor unless the officer is a witness to the act, but that he may make an arrest for a felony when he has probable cause to believe that a felony has been committed and that the party charged is guilty. The charge against Lyons was larceny, which is a felony, and he was arrested without a warrant. The arrest and imprisonment were, therefore, illegal, if made without probable cause.

Taking, then, the allegations of the petition as true for the purpose of the trial of the exception, do they show probable cause?

There is an allegation that Carroll reported the theft of the jewel to Kerwin and DeRance as police officers, and another that he gave the officers the names of those whom he suspected and charged with having committed the theft, or of being implicated therein, and whom he wanted arrested and prosecuted therefor, and among the names so given by Carroll was that of the plaintiff.

There is a further allegation to the effect that on the evening following the theft, Kerwin and DeRance met the plaintiff on the street and were having some conversation with him, walking along the street with him at the time, when they met Carroll, who stopped to talk with the officers, and that thereupon Kerwin asked Carroll if the plaintiff was one of the parties—meaning one of the parties whom he (Carroll) suspected of being implicated in the crime—and Carroll answered “yes.” Whereupon the plaintiff remonstrated with Carroll and declared his innocence, notwithstanding which Carroll, then and there, in reply said:—“Never mind, I will fix you,” or words to that effect, and walked away.

Then it was, as alleged in the petition, that the officers arrested the plaintiff, took him off to the police station, and “there charged him with the robbery of the diamond stud, on the complaint of Daniel S. Carroll.”

He was locked up, but some hours later gave bond and was released.

The next day another police officer, named Simone, made affidavit “on information received” charging plaintiff with the theft.

When the cause came before the police court for trial he was acquitted and discharged.

Another allegation found in the petition directly attributes the arrest, imprisonment and prosecution of the plaintiff to the information given by Carroll and charges that the same was done at Carroll's instance and request.

On this showing it cannot be said the police officers acted without probable cause, and that they, under the circumstances, transcended the reasonable limits of their duty in taking the plaintiff into custody.

They were called upon as officers of the law to perform a public duty, to-wit, ferret out and arrest parties thought to have committed an infraction of the criminal laws, and from what occurred, as narrated in the petition, we are unable to reach the conclusion that they did not have grounds for believing, for entertaining an honest and reasonable suspicion that the plaintiff was one of the guilty parties. See *Womack vs. Fudiker*, 47 La. Ann. 36.

Those who honestly seek the enforcement of law and the administration of justice, and who are supported by circumstances sufficiently strong to warrant a cautious man in the belief that the party suspected may be guilty of the offence charged, should not be made unduly apprehensive that they will be held answerable in damages. *Breaux's Digest*, p. 705, No. 12, *Ib.* p. 706, No. 19.

It is, therefore, ordered and decreed that the judgment appealed from be affirmed.

No. 14,377.

STATE EX REL. METROPOLITAN BANK VS. JUDGE OF THE CIVIL DISTRICT
COURT FOR THE PARISH OF ORLEANS.

SYLLABUS.

Where a trial judge refuses to order that a commission issue to take the testimony of a witness for the purposes of the trial of a matter pending before him, on the ground that the interrogatories propounded show that such testimony would be irrelevant and impertinent, the remedy is by appeal from the final judgment thereafter to be rendered and not by *mandamus* directing the issuance of the commission.

APPPLICATION for a writ of *Mandamus*.

Dinkelspiel & Hart, for Relator.

State ex rel. Bank vs. Judge.

John St. Paul, Respondent Judge, *pro se*.

James F. Pierson and *Horace E. Upton*, of counsel for Edward Pierson, Administrator, in support of Respondent Judge.

The opinion of the court was delivered by

MONROE, J. This is an application for the writ of *mandamus* to compel the judge of the district court to allow the relator to file a motion for commissions to take the testimony of certain witnesses, and to make the necessary orders for the issuance of such commissions.

The respondent, in his return, states that he had no intention of refusing to permit relator to *file* the motion referred to and it is conceded that no action is needed as to that ground of complaint, the important question being, whether relator is entitled to the writ for the other purpose stated in the application. Upon that subject, the return of the respondent is, that the interrogatories prepared by the relator and the testimony which it proposes to take under commission, "are totally irrelevant, immaterial and impertinent to any issue pending" in the cause in which the commissions were demanded, and he annexes to his return copies of the proceedings in connection with which the demand was made. From these, it appears that there had been filed in the district court the mandate of this court, whereby certain issues in controversy between the relator and the Succession of J. J. Gragard, had been determined and the cause had been remanded for a purpose involving the taking of further testimony, and that thereafter, the relator applied for the commissions to take the testimony of a number of witnesses residing in different places. The counsel for the administrator thereupon took a rule upon the relator, suggesting that the taking of such testimony would involve great delay and expenses and that it appeared from the interrogatories propounded, which were exhibited with the rule, that the matters inquired about were no longer open to inquiry but were concluded by the judgment of this court, and that the taking of the testimony would be in contravention and contempt of said judgment. The relator was accordingly ordered to show cause why its application should not be denied, and, after hearing the counsel and considering the interrogatories, its application was denied, for the reasons which are given in the return of the respondent judge.

The remedy, we think, is by appeal, the case not being materially different from what it would be if the testimony had been taken and

excluded on the trial, or if the judge *a quo* had refused to grant the delay necessary for the return of the commissions, or if he had made almost an order, in the course of the trial, which might be open to exception, at the time, and to correction in the review of the final judgment. As was said in the case of State *ex rel.* Halphen vs. Judge. 38 Ann. 97: "Our jurisprudence would be revolutionized if we should hold that every right which has heretofore been enforced by appeal and every wrong which has heretofore been redressed by appeal may now be redressed, or enforced, by *mandamus* whenever the necessities of a suitor may appear to require or invite it."

The rule *nisi* herein issued is discharged and the application for the writ of *mandamus* is denied at the cost of the relator.

NICHOLLS, C. J., and BREAU, J., dissent.

No. 13,694.

PEOPLES' HOMESTEAD ASSOCIATION VS. HENRY L. GARLAND, JR.

SYLLABUS.

1. City taxes are Imprescriptible, but the privileges securing them are prescribed by three years.
2. When the privileges are prescribed, taxes become mere personal claims against the tax debtor and are of no effect against mortgage creditors.
3. The character of tax debtor results from the operation of law and not from the convention of individuals, and the party assessed is, in law, the tax debtor.
4. The assumption in an act of sale of a city tax is not a *stipulation pour autrui* for the benefit of the city, but is a matter purely personal to the contracting parties and forming part of the consideration of their contract.
5. A claim asserted by the city, not by virtue of any inherent or statutory governmental power, but as one arising under the Code from the stipulation of a private contract, will be tested by the same law as would govern between individuals.
6. As the assumption neither impaired the city's right to enforce its tax in the manner and within the time provided by law, nor induced her to shift her position, there is no foundation for a plea of equitable estoppel.

A PPEAL from the Civil District Court, Parish of Orleans.—
King, J.

Carroll & Carroll, for Plaintiff, Appellant.

Homestead Association vs. Garland.

Frank B. Thomas, Assistant City Attorney, for the City of New Orleans, Defendant in Rule, Appellee.

* In this case, His Honor, the CHIEF JUSTICE being recused, and their Honors, the ASSOCIATE JUSTICES being evenly divided in opinion as to the proper determination to be made of the issues involved, JUDGE HORACE L. DUFOUR, of the Court of Appeals for the Parish of Orleans, having been called upon by previous order of this court to sit in the case, pronounced the judgment of the court therein in words and figures as follows, to-wit:

* DUFOUR, J. On June 11th, 1894, the plaintiff bought certain real estate from the defendant, and the act of transfer contained a clause that "the purchaser assumes payment of all taxes for the year 1894."

On the same day, the plaintiff resold the property to the defendant, and the act of transfer granted a special mortgage and vendor's lien, and also declared that the purchaser assumed payment of all taxes for the year 1894.

At that time the city tax bills for 1894 had not been turned over to the City Treasurer for collection. In 1900, the plaintiff foreclosed its mortgage *via ordinaria*, obtained judgment for \$6000 with recognition of its vendor's lien, and a sale of the property, under *fi fa.*, brought two thousand four hundred dollars, a sum insufficient to satisfy the writ.

Upon discovery that there stood recorded against the property a privilege for the unpaid city taxes of 1894, the plaintiff ruled the city into court to show cause why the tax and tax privilege should not be cancelled as barred by the prescription of three years.

From a judgment discharging the rule, this appeal has been taken.

It is urged by the city that the tax is imprescriptible and that the plaintiff, having assumed its payment, became the tax debtor and cannot, in consequence, be heard to plead prescription in bar of the privilege.

It is now settled:

1st. That city taxes are imprescriptible, but that the privileges securing them are prescribed by three years.

41 Ann. 128; 52 Ann. 1626.

2nd. That, notwithstanding the tax privileges have become prescribed, the city has the right to proceed against the party assessed for the purpose of realizing the taxes, so long as the property remains in the ownership of the person to whom they were assessed.

43 Ann. 813.

3rd. That when the privileges are prescribed, taxes become mere personal claims against the tax debtor, and are of no effect against mortgage creditors or subsequent owners of the property.

44 Ann. 279.

Bearing in mind the above principles and the contention of the city, the pertinent inquiry must needs be who, in point of law, is the tax debtor?

The character of tax debtor is one which results from the operation of law and not from the convention of individuals.

Taxes are personal obligations imposed on the owner, as well as a charge upon the property itself.

42 Ann. 1135.

The party assessed is the tax debtor, upon whom falls this obligation and so far as the assessment and original liability are concerned, every one else is, in law, a third person, between whom and the taxing power, there is no privity of relation.

In this instance the plaintiff association did not own the property either at the time of assessment or at the time the tax became due or exigible.

It cannot properly, therefore, be considered the tax debtor.

It follows that, if plaintiff be liable, it must be solely by virtue of the assumption referred to.

In the absence of any text of law on the subject, such assumption cannot benefit the city, unless it be viewed as a *stipulation pour autrui* in its favor.

We find nothing tending to impress that character upon the act.

The matter was one purely personal to the contracting parties, exclusively in their own interest, and not in the remotest degree intended for the benefit of the city who was not a party to the contract.

The assumption by another of the tax did not relieve the party assessed of his liability therefor; in contemplation of law he remained the tax debtor. It merely gave him the right to recoup himself against his vendee in case he were compelled to pay the tax assumed by the latter, but conferred no rights on any one else. Thus, it has been held that a stipulation that a certain sum shall be paid to a third person towards the extinguishment of a debt due to him from one of the parties to the contract, is not a *stipulation pour autrui*, but that the assumption of the debt is part of the consideration or price of the property intended exclusively for the benefit of the stipulating party.

2 R. 523.

Homestead Association vs. Garland.

But were we to go a step further, and concede the assumption to be a *stipulation pour autrui*, the city's position would not thereby be improved, for the reason that the stipulation was revoked before the city signified its assent to accept it.

Considering that the sole purpose of the two transactions was to convert a mortgage into a vendor's lien, they may properly be treated as one.

The reassumption by Garland in his purchase from the association of the tax assumed by the latter when it bought from Garland, restored the parties to their original respective positions, and was equivalent to the annulment or revocation of the original assumption. There was no acceptance by the city except such as resulted from its claim first made in the answer to the instant rule six years afterwards.

R. C. C. 1890-1902.

44 Ann. 206.

The city is not asserting a claim by virtue of any inherent or statutory governmental power, but one arising under the Code from the stipulations of a private contract. There is, under the circumstances, no reason why the law applicable to individuals should not be meted out to the municipality, or why she should not bear the burden of the law whose benefit she has invoked.

It may be added that, as the assumption did not impair the city's right to enforce its tax in the manner and within the time provided by law, and did not induce her to adopt any particular course or to shift her position on the faith of it, there is no basis for an equitable estoppel.

Our conclusion is, that the tax privilege being prescribed, the city has no claim on the property or its proceeds that can be asserted to the detriment of the mortgage creditor.

The plaintiff, however, is without interest to ask for the cancellation of the *tax* itself which affects only the tax debtor.

The judgment is reversed, and it is now ordered that the City of New Orleans and the Recorder of Mortgages be ordered to cancel from their records the privilege for the city tax of 1894, in so far as the same purports to bear upon and affect the real estate herein sold by the sheriff, the costs of this rule in both courts to be paid by the city.

BREAUX and BLANCHARD, J. J., dissent, and the latter hands down an opinion expressing the reasons of his dissent.

State vs. Ikenor.

No. 14,348.

STATE OF LOUISIANA VS. JOE IKENOR.

SYLLABUS.

Prior to sentencing a defendant in a capital case, he should be asked by the court whether he had anything to say why the sentence of the court should not be pronounced against him.

A PPEAL from the Second Judicial District, Parish of Bossier--
Watkins, J.

Walter Guion, Attorney General, *T. T. Land*, District Attorney
(*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Joannes Smith, for Defendant, Appellant.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant, sentenced to be hanged under the verdict of a jury convicting him of murder, has appealed.

The case was submitted to us on the face of the record. Our examination disclosed no error other than that no mention was therein made of the fact that, prior to sentencing the defendant, the court had asked him "whether he had anything to say why the sentence of the law should not be pronounced against him?"

The Attorney General was thereupon directed to ascertain whether that formality had been omitted as a matter of fact or whether the minutes were incomplete. Through due proceedings we have been informed that the question was, in point of fact, propounded to the defendant before sentence. Defendant and his counsel admitted this fact on being ruled into court to show cause why the minutes should not be corrected, and consented to the correction of the minutes. Finding now no reasons for setting aside the verdict or reversing the judgment, the judgment appealed from is hereby affirmed.

No. 14,287.

J B. MOUNT ET AL. VS. L. R. HARRELL.

SYLLABUS.

Tracts of land were sold by defendant to plaintiffs and each tract, except one, was sold as containing a stated number of acres.

The vendor, when the parties met to complete the deed, swore that he said to the vendees that he was not prepared to give correct descriptions of the land and that vendees requested him to complete the deed by describing the tracts as correctly as possible. This was not contradicted.

The vendor sold all the land he owned in the locality named. The vendees claim that there is a deficiency and sue for diminution of the price. There is deficiency in the number of acres in the tracts named, but there is no deficiency if all the lands in the locality, not designated by the names and the number of acres, is taken into account.

Held—That in making up the total number of acres sold, defendant is entitled to include the acres not described with those described. All the tracts were of about equal value per acre and the nature of the land about the same.

A PPEAL from the Twenty-first Judicial District, Parish of Pointe Coupee—*Claiborne, J.*

Montgomery & Percy (Saunders & Gurley, of Counsel), for Plaintiffs, Appellants.

Yoist & Hewes, for Defendant, Appellee.

The opinion of the court was delivered by

BREAUX, J. Plaintiffs, alleging a deficiency in the number of acres of land they bought from the defendant, sue for a diminution of the price.

Defendant sold a number of tracts to the plaintiffs, describing each tract by name, but not by boundaries, and giving the number of acres contained in each tract, not mentioning the total acreage of all the tracts. On examination, we find six thousand five hundred and seventy-nine acres is the number.

Plaintiffs' contention is that six hundred and forty and 86-100 acres

of land in the tract known as the "Glass tract" and three hundred and twenty acres in the "McCajah Barrow" tract and three hundred and ninety-one and 80-100 acres in the "Butler Gilbert" tract go to make up the tract of land called "Dr. Rigney" of two thousand two hundred and fifty (2250) acres; that these tracts are by the description sold twice and thereby increase the acreage one thousand three hundred and fifty-two and 66-100 acres (1352 66-100), more than one-twentieth part of the whole.

Defendant admits the sale and alleges that through no fault of his the description is faulty and defective; that some of the lands are apparently sold twice under different names and other tracts are entirely omitted. He specially avers that he sold all lands owned by him on Raccourci Island, and that the deed contains one hundred and forty-one and 44-100 acres (141 44-100) over and above the total number contained in the different tracts.

The land is described as follows in the deed:

1. The Hill and Schlater tract.....	containing	680	acres
2. The Burdick tract.....	"	280	
3. The Lake Breeze tract.....	"	640	
4. The Wm. Leake tract.....	"	775	
5. The Glass tract.....	"	640	
6. The McCajah Barrow tract.....	"	320	
7. The Dr. Rigney tract.....	"	2250	
8. The Butler Gilbert tract.....	"	391	
9. The Church and Peyton tract.....	"	120	
10. The L. Babers tract.....	"	242	
11. State lands	"	241	
12. "All batture lands accruing to the above lands and all other lands owned by the vendor on Raccourci Island are hereby transferred to the vendees by this act."			

The land was sold, with a number of mules, for the sum of seventeen thousand four hundred dollars (\$17,400.00). All parties concerned agree that the price for the mules was two thousand four hundred dollars (\$2400.00) and that the price agreed on for the land was fifteen thousand dollars.

The number of tracts delivered presents the first question for determination, and if an insufficient number has been delivered it will be-

come necessary to determine whether the acreage called for can be supplied by including other lands than those specifically referred to by name in the deed.

In reviewing the facts our attention was attracted by defendant's statement as a witness that he said to plaintiffs, who met him to pass the deed, that he did not have a complete description of the land and that plaintiffs, replying, said, "You are selling all the lands on the island. Give as correctly as you can the description of the property"; that there was nothing said at the time about the acreage or specifically about the price of each acre. This is not contradicted by plaintiffs, who testified while the case was on trial.

With reference to the description, the defendant testified that the McCajah Barrow tract is described twice in the act of sale in question: but that this is offset by a larger acreage in land he bought from the State mentioned in the foregoing list of lands as less than it actually contains; that the Hill and Schlater tract, mentioned in the list as containing six hundred and eighty acres (680), contains nine hundred and sixty acres.

In the absence of a survey or of any plat showing the acreage by the least attempt at measurement, we have taken up and examined as best we could the number of acres set forth in each deed under which defendant held at the time of the sale.

In the deed under which defendant held before he sold, the Dr. Rigney tract was divided into four different tracts and each tract was described by boundaries.

Taking up the question of the area of the tract containing six hundred and eighty (680) acres, as per the defendant's deed to plaintiffs, viz, the Hill and Schlater tract, we find that it was bought by the defendant from the parties just mentioned in 1895, and is known as the "Woodland," containing nine hundred and sixty (960) acres, with boundaries given in the deed.

The second tract in the same deed is described as also situated in West Feliciana on Raccourci Island, bounded north by the Woodland, east by P. W. Barrow, south by vendee, west by line of Pointe Coupee. The number of acres in this tract is not stated in the deed.

The next is the Wm. Leake tract. It was sold by defendant as containing seven hundred and seventy-five acres (775). We turn to the deed under which defendant held and find that this was the number of

acres he bought from William Leake in 1888. It is described in the deed as sections 10 and 15, T. 2, S. R. 5, W.

The defendant, vendor to plaintiffs, sold the Ames Webb tract as containing six hundred and forty acres (640) in the deed under which he held dated in 1881. This tract is described as containing the number of acres corresponding with the number he sold. The same is true as to the number of acres in the Glass tract, viz: six hundred and forty acres (640) sold to the defendant at the sale in 1887.

We take it that the Lake Breeze place was bought by the vendor in 1888 from Sheriff Barrow, sold to effect a partition, as it is the only place which measures six hundred and forty-six acres (646), as mentioned in the last deed.

There was a McCajah Barrow title to three hundred and twenty (320) acres bought by defendant in 1890 from the tax collector. We understand that that is the land referred to in defendant's deed to plaintiffs.

There was a two hundred and eighty acre (280) tract bought by defendant in 1890 at tax sale which corresponds to the number sold to plaintiffs and which we understand is the place referred to under the name of Burdick (R. p. 34). The number of acres corresponds and to some extent the name.

The Butler Gilbert tract, we have reason to say, was bought by defendant at tax sale in 1893. (R. p. 36.)

The L. Babers land is referred to in an act of sale by Clack, sheriff of West Feliciana, in 1893, to defendant as belonging to L. L. Babers, and as containing two hundred and forty-two (242) acres. The name and number of acres correspond with the name and number of acres of the tract described above as the Babers tract. (R. p. 37.)

Defendant held patent per certificate 2883, N. S. L., Act 25 of 1894, to one tract of four hundred and twenty-one and 12-100 acres (421.12). (R. p. 39.) Lanier, Register.

The Church and Peyton title is of record and was acquired by defendant in 1899. (R. p. 49.)

The complaint of plaintiff is that the Glass, the McCajah Barrow, and the Butler Gilbert tracts were sold twice because they were in the Dr. Rigney tract. Without including the Dr. Rigney tract, as referred to under that name, we find that plaintiffs have received a number of acres equal to the number bought by them, as will be seen by the following list:

1. The Amés Webb tract of land, bought in July, 1891. (R. p. 15), containing.....	640	acres
2. The Wm. Dix tract, bought in July, 1881 (R. p. 16), containing	640	"
3. The John Crocket tract, bought in July, 1888 (R. p. 17), containing	644.56	"
4. The Glass tract, bought in 1887 (R. p. 20), containing	640	"
5. The Lake Breeze tract, bought in 1888 (R. p. 31), con- taining	643	"
6. The Wm. Leake tract, bought in 1888 (R. p. 23), con- taining	775	"
7. The Burdick place, bought in 1888 (R. p. 27), contain- ing two-thirds of.....	145	"
8. The Burdick place, bought in 1888 (R. p. 24), contain- ing one-half of two-thirds of.....	145	"
9. The Breeze place, bought in 1888 (R. p. 30), containing	646	"
10. The McCajah Barrow place, bought in 1890 (R. p. 32), containing	320	"
11. The Butler Gilbert tract, bought in 1893 (R. p. 35), containing	391.82	"
12. The Darling Babers tract, bought in 1893 (R. p. 37), containing	242	"
13. The land known as the State land, bought in October, 1894 (R. p. 39), containing.....	421.12	"
14. The Hill and Schlater land, bought in 1895 (R. p. 40), containing	960	"

We here insert this list in order to avoid further reference to particular tracts. The deeds of purchase of the defendant show the number of acres opposite the name of each.

Plaintiffs further urge that the vendees are entitled to the different tracts and the number of acres contained in each, and that in addition they are entitled to all the land he owned on Raccourci Island; that if the vendor had other tracts he bound himself to deliver the other tracts.

This objection finds an easy answer as to a part of the number of acres in the fact that two of the tracts contain more land than is set forth in the description in the deed. The Woodland was sold as containing six hundred and eighty acres (680); it contains a larger amount than nine hundred and sixty acres (960). In addition, the

lands transferred by the State were delivered as amounting to two hundred and forty-one acres (241), while they amount to four hundred and twenty-one and 12-100 acres (421.12). This leaves a deficiency on plaintiffs' theory of four hundred and eighty-nine and 78-100 acres (489.78).

Without including the Dr. Rigney tract and including the three tracts which form a part of the Dr. Rigney tract, that is the Glass, the McCajah Barrow, and the Butler Gilbert tracts, plaintiffs are in possession of as many acres as they bought. Plaintiffs bought all of defendant's lands on the island before named. It included the tracts in question, also the lands not specifically described. The uncontradicted testimony of the defendant renders it clear in our view that it was not intended that defendant should be held to warrant the number of acres in each particular tract. The number of acres sold was six thousand five hundred and seventy-nine (6579). Plaintiffs are in possession of that number. They are not entitled to that number plus other lands owned by the defendant at that time. The deficiency is made up by the tracts containing a larger number than described in the deed and by other lands which the parties did not appear to have in contemplation at the time, but which they included, as we understand, in order to make it certain that defendant would have no right to claim other lands if he owned other lands on the island. It was the purpose to buy all the lands the vendor had in the locality before mentioned.

In one instance (that is in the Hill and Schlater deed) the number of acres of the tract is not given at all, as we have noted, negating the idea that each tract specially mentioned was bought with reference to the number of acres of the land. This would lead to the inference that all the tracts were sold with the view of making up a total number of acres—i. e., the total before mentioned.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be and it is hereby affirmed.

No. 14,414.

STATE EX REL. JOHN C. HORTER VS. JUDGES OF THE COURT OF APPEAL FOR
THE PARISH OF ORLEANS.

SYLLABUS.

Where it appears that a title set up to property by one who claims possession under it is contested by the possessor of the property, who, fearing eviction, sues to annul the title and enjoins against eviction, the *possession* of the property is not alone at issue, and the value of the property being in excess of \$2000 this court, and not the Court of Appeal, has jurisdiction to entertain an appeal involving the controversy.

A PPLICATION for Writs of *Mandamus* and *Certiorari*

Harry H. Hall, for Relator.

Respondent Judges *pro se*.

E. Howard McCaleb, for David G. Baldwin, Respondent.

The opinion of the court was delivered by

BLANCHARD, J. David G. Baldwin instituted suit *via executiva* against John C. Horter in foreclosure of a mortgage for \$10,000, and at the sheriff's sale which followed purchased the property covered by the mortgage for \$6,500.

Horter, who occupied the premises thus bought, thereupon brought an action against Baldwin and the sheriff to have this sale to Baldwin decreed null, and to enjoin them from dispossessing him of the property.

To the petition setting forth his complaint, defendants, Baldwin and the sheriff, filed exceptions of no cause of action, which the trial judge sustained, dismissing the suit and dissolving the writ of injunction.

Whereupon, Horter took an order of appeal from this judgment to the Court of Appeal for the Parish of Orleans, and lodged the appeal there.

It was met by a motion to dismiss for want of jurisdiction *ratione materiae* in that tribunal.

The Court of Appeal, acting rather *ex proprio motu* than on the motion to dismiss, because of some irregularity affecting the latter, held the court to be without jurisdiction and dismissed the appeal.

Whereupon, the appellant, Horter, failing in his application for re-

hearing, applied to this court for its writ of *certiorari* to bring up the record of the cause, and for a writ of *mandamus* to compel the Court of Appeal to entertain jurisdiction of the appeal.

It is alleged that no other court has jurisdiction of the appeal and unless the Court of Appeal is constrained to take jurisdiction, relator will be deprived of his right of appeal altogether, and that no relief in the premises is open to him except through the writs of *certiorari* and *mandamus*. See *State ex rel. Sorel vs. Foster*, Judge, 106 La. 425.

To the rule *nisi* issued by this court, the respondent judges make return, justifying their action in dismissing the appeal on the ground that the purpose of the suit brought by relator against Baldwin and the sheriff was to annul a judicial adjudication of real property made under executory process to enforce a mortgage for \$9,500 on property which Baldwin had bid in at the sale for \$6,500, and the value of which is averred by the relator to be \$16,000.

The contention of the relator is that what is at stake in the suit he brought against Baldwin and the sheriff is *the possession* of the property, which is not worth more than two thousand dollars, or a sum within the maximum jurisdiction of the Court of Appeal. He insists his proceeding is one to be protected from trespass in his *possession* only.

It is deemed unnecessary to discuss the averments of the petition. The character of the action is determined by its prayer.

The prayer of the petition in the suit against Baldwin and the sheriff is two-fold:—

1. Judgment is asked in favor of the petitioner and against the defendants, decreeing the sale made by the sheriff under the executory process, which issued at the suit of Baldwin vs. Horter, and all the proceedings had thereunder, to be null and void and of no effect.

2. A writ of injunction is asked restraining Baldwin and the sheriff from taking any further proceedings under and by virtue of the executory process, or the sale and adjudication made thereunder, or from interfering by virtue thereof with the petitioner in his possession of the property sold.

Here, then is a suit, one of the demands of which, and the one upon which the other demand is predicated, is to annul a sheriff's sale of property which the relator in his petition to annul avers to be worth \$16,000, which was proceeded against in foreclosure of a mortgage for \$9,500 and which brought at the sale \$6,500.

All these amounts are far beyond the maximum jurisdiction of the Court of Appeal.

In order to determine whether relator is entitled to be maintained in that possession of the property which he avers is really the only thing at issue, it must first be decreed that the sheriff's sale of the property to the purchaser, Baldwin, who seeks possession thereunder, is null.

Since the sheriff's sale affects property of a value far in excess of the jurisdiction of the Court of Appeal, it must be held that tribunal has no authority to entertain the appeal.

Because the relator, in his petition in the suit against Baldwin and the sheriff, sets up that Baldwin is the owner of the property in question under a tax title acquired pending the advertisement of the property for sale under the executory proceedings, avails nothing in the way of vesting jurisdiction in the Court of Appeal.

Baldwin was not claiming, at the time he was enjoined, possession of the property under the tax title it is alleged he had acquired. He was claiming possession as adjudicatee at the sheriff's sale. The title he set up to the property was the one springing from the sheriff's sale. His right of possession—the one he was preparing to enforce—was predicated on that title.

If the title be good and valid the writ of possession he was about to invoke would lie. Who is to decide whether the title is good? Why only that court vested with jurisdiction covering the value of the property as to which the *particular* title set up is contested.

That court is the District Court, in the first instance, and this court on appeal.

On the merits of the controversy, the contention of relator that the acquisition by Baldwin of the property at tax sale extinguished the note and mortgage by confusion and, thereafter, the executory proceeding no longer had virile force, may or may not be good. But what court on appeal is to determine the question thus raised? Why, only that court whose jurisdiction is latitudinous enough to embrace controversies involving property of the value of that over which this dispute arose.

It is not, then, the mere *possession* of the property that is in dispute. A *title* to the property set up by Baldwin is contested and denied. It is *that* title upon which he chose to rest his right of possession, rather than upon that other which he acquired at tax sale.

It is ordered that the rule *nisi* which issued herein be discharged, and that the peremptory writ of *mandamus* be denied at the cost of the relator.

No. 14,218.

J. L. BAKER VS. ATKINS & WIDEMAN ET ALS.; JAMES A. PRATT VS. ATKINS
& WIDEMAN ET ALS.; T. S. MATTHEWS ET AL. VS. W. R. PULLIN,
SHERIFF, ET ALS.

SYLLABUS.

Where "A" is the owner of real estate, by undisputed title, and sells the same to "B," who fails to record his title, the judgment creditors of "A" can acquire judicial mortgages on such property by recording their judgments after the date of such sale and before its registry.

And, in such case, the judicial mortgages recorded against "A," prior to the registry of the sale, prime all such mortgages recorded against "B," whether the latter be recorded before or after the former.

CERTIFIED from the court of appeal, first circuit, by the judges thereof applying for instructions.

The opinion of the court was delivered by

MONROE, J. The judges of the court of appeal of the first circuit certify the following questions:

"1. Where A is the owner of real estate, by undisputed title, and sells the same to B, who fails to record his title, can the judgment creditor of A acquire a judicial mortgage on said property by duly recording his judgment after the date of said sale, but before the same is recorded?"

"2. If so, what is the rank of said judicial mortgage as to a judicial mortgage against B, resulting from the registry of a judgment against him after the date of the unrecorded sale, but before the registry of the other judgments?"

It appears from the statement of the learned judges, that, in 1889, W. H. Hope sold certain real estate to T. S. Matthews, and that the parties failed to record the act of sale. Atkins & Wideman obtained judgment against Matthews which they recorded in December, 1891. Pratt obtained several judgments against Hope, which he recorded in March, 1893. And Baker obtained judgment against Hope which he recorded in July, 1893. Sometime afterwards, the act of sale from Hope to Matthews was registered, and, thereupon, or thereafter, Atkins & Wideman seized the property, as belonging to Matthews, and had it

107	490
111	739
107	490
114	451
107	490
1125	183

Baker vs. Atkins & Wideman et als.; Pratt vs. Same; Matthews et al. vs. Sheriff et als.

sold under execution, and Baker and Pratt came in by way of third opposition and claimed preference on the proceeds, as creditors of Hope, with judicial mortgages on the property, antedating the registry of the conveyance to Matthews.

The determination of the questions certified depends upon the construction to be placed upon the following Articles of the Civil Code:

"Art. 2440. All sales of immovable property shall be made by authentic act or under private signature. Except as provided in article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

"Art. 2275. Every transfer of immovable property must be in writing; but if a verbal sale or other disposition of such property be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated under oath, provided actual delivery has been made of the property thus sold."

"Art. 2264. No notarial act concerning immovable property shall have any effect against third persons until the same shall have been deposited in the office of the parish recorder, or register of conveyances, of the parish where such immovable property is situated."

"Art. 2254. It shall be the duty of the recorder to indorse on the back of each act deposited with him the time it was received by him and to record the same without delay in the order in which they were received; and such acts shall have effect against third persons only from the date of their being deposited in the office of the parish recorder."

"Art. 2266. All sales, contracts and judgments affecting immovable property which shall not be so recorded shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording. The recording shall have effect from the time when the act is deposited in the proper office and indorsed by the proper officer."

"Art. 2242. An act under private signature, acknowledged by the party against whom it is adduced, or legally held to be acknowledged, has, between those who have subscribed it, and their heirs and assigns, the same credit as an authentic act."

"Art. 2246. Sales or exchanges of immovable property by instruments made under private signature are valid against *bona fide* purchasers and creditors only from the day on which they are registered in the manner required by law."

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"Art. 2253. The record of an act under private signature, purporting to be a sale or exchange of real property shall not have effect against creditors or *bona fide* purchasers, unless, previous to its being recorded, it was acknowledged by the party or proved by the oath of one of the subscribing witnesses, and the certificate of such acknowledgment be signed by the parish recorder, a notary, or a justice of the peace, and recorded with the instrument."

"Art. 3322 (as amended by act No. 78 of 1900). The judicial mortgage takes effect from the day the judgment is recorded in the manner hereinafter directed."

"Art. 3328. The judicial mortgage may be enforced against all the immovables which the debtor actually owns or may subsequently acquire."

The foregoing provisions of law, in so far as they relate to sales of immovable property, establish and emphasize the rules: (1) That such sales shall be without effect unless evidenced by writing, with the single exception, that a verbal sale is to be held good as against the vendor or vendee who confesses it when interrogated on oath, provided, actual delivery has been made of the property. (2) That all such sales shall be "utterly null and void, except between the parties thereto," unless, and until, duly recorded in the proper office, and to this rule there is no exception. Turning, however, to another part of the Code, we find, under the title "Of Mortgages," the two articles Nos. 3322 and 3328, which have been quoted, and, upon the basis of which it is thought, by one of the learned judges whose questions we are endeavoring to answer, that a judicial mortgage against the holder of an unregistered title takes effect when recorded, not only as between the mortgagee and such holder, but as priming all judicial mortgages recorded against the owner of record subsequently to the date of the unregistered conveyance, from which date and for which purpose it is assumed that the unregistered vendee "actually owns" the property.

It is admitted that "so long as a sale is unregistered an innocent third person may acquire a valid mortgage, or title by purchase, either from the apparent owner, himself, or by seizure and judicial sale made at the instance of the creditor of the apparent owner. 'But,' it is said, 'in all cases where the judgment creditor's right has been sanctioned to seize and sell the property of his debtor, as against the real owner under an unrecorded title, the same was attached or seized.

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before the recordation of the title to the purchaser. In instances of this character, it is the fact of the previous seizure that confers the right, as against the apparent owner; and the question of the mortgage or no mortgage has no bearing in determining the rights of the respective parties under such conditions. It is the action of the creditor, based on the faith of the records, that confers a superior right in favor of the creditor over that of the real owner under an unrecorded title. But when the creditor undertakes to exercise his claim to a judicial mortgage an entirely different question is presented. In the latter case, under the plain provisions of the civil code, the creditor's right of mortgage is limited and restricted to the property actually owned by the debtor at the time of the registry of the judgment."

It would follow from the view thus presented that for the purposes of all judicial mortgages, whether recorded against the owner of record, or against the holder of the unregistered title, the latter must be regarded as the *actual* owner of the property, and, *quoad* that property, as the only person affected. The answer to this, we think, is to be found in the declaration of the law, that no sales of immovable property shall "have any effect against third persons, until the same shall have been deposited," etc.; that such sales "shall have effect against third persons only from the date of their being deposited," etc.; that "all sales of immovable property which shall not be recorded shall be utterly null and void except between the parties thereto," etc. Giving effect to these provisions, there can be no actual owner of immovable property, so far as third persons are concerned, other than the owner of record; for, except as between the parties thereto, an unrecorded conveyance is "utterly null and void," and conveys no title.

As between the parties, however, the unrecorded conveyance makes the grantee the actual owner of the property; and as between the grantee and his creditors, the latter may enforce their judgments either by executing them or by recording them as judicial mortgages, and it is in that sense, and to that extent, as we understand it, that article 3323 is intended to have effect. If, upon the other hand, we attempt to give that article the effect attributed to it, we at once become involved in complications and contradictions from which there is no extrication. And, in this connection, it may be remarked, that the inclination to acquire absolute dominion over some part of the earth's surface and to hold on to the part so acquired seems common to all mankind. And,

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being a species of property which can neither be removed nor concealed, it constitutes a visible asset inducing confidence in the financial responsibility of the owner and affording to his creditors a convenient source from which to obtain satisfaction of their claims. For these reasons, and for others that might be mentioned, it is obviously of the utmost importance to the peace and welfare of society that all questions as to the manner in which title to such property is acquired and divested, and as to the moment at which one person becomes, and another ceases to be, the owner should be governed by definite and fixed laws. And, hence, we take it, the explicit and reiterated provisions of our Code. But, if it be held that, *quoad* the judicial mortgagee, the actual owner of the real estate is, or may be, the holder of the unregistered title, whilst as to all other third persons the actual owner is the owner of record, we introduce into our system of law an element of uncertainty which appears to us to be destructive of the purpose to be accomplished. Thus, if it be true that the owner of record, notwithstanding the fact that he has already made a sale, which has not been registered, may sell or mortgage his property; and if it be true that, notwithstanding such unregistered sale, or conventional mortgage, the property may be attached, or seized under execution, or under executory process, at the instance of his creditor, what reason can there be for denying to such creditor the right to record and make effective his judgment as a judicial mortgage? The law under which he acts leaves it optional with him to issue execution, or not, as he pleases; to record his judgment or not as he pleases. Why, then, should it be said that his debtor is the actual owner of certain real property for the purposes of the execution, but that, for the purposes of the mortgage resulting from the registry of the judgment, the owner is unknown and is at liberty to disclose his identity at his convenience? Another consideration which affects the question is, that, so long as the title to real estate stands in a man's name it may give him credit which he might not otherwise enjoy, and it would be impossible to say, in any given case, and in the absence of evidence on the subject, how far a creditor, whose debt is contracted during such period is influenced in his dealing by the credit which his debtor derives from that source. Our jurisprudence upon the subject is reasonably clear, though there are perhaps one or two decisions which might admit of, or require, a somewhat nice differentiation.

In *Logan vs. Hebert*, 30 Ann. 727, it was held that an unrecorded deed transfers the property to the purchaser as against all the world

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except creditors of the vendor and *bona fide* purchasers from him, without notice, and that the registry of a judgment will operate as a judicial mortgage on all the immovables belonging to the debtor, and situated in the parish where the registry is effected, whether the title to such immovables is recorded or not, and will be good against everybody that such debtor's title is good against; which is equivalent to saying that such mortgage was *not* good against creditors of the vendor of the property.

In Gallagher vs. Congregation, 35th Ann. 829, it was held that, as to the owner by unregistered title a recorded judgment operates as a judicial mortgage; but the court said: "Where the act is unrecorded, those creditors" (referring to the creditors of the vendor) "are not presumed to know of its existence, and if they know of it they are not bound to respect the transfer. They are authorized to ignore it and to proceed directly against the property as though the transfer had never taken place and the property unquestionably belonged to their debtor."

The cases of Broussard vs. Sheriff, 44 Ann. 880; Succession of Manson, 51 Ann. 130; and Douglas vs. Douglas, *ib.* 1455, presented peculiar features of their own.

In Broussard vs. Sheriff, the plaintiff, a married woman, sued for the recovery of certain property which had been seized by the creditors of one Nunez, her position being that the alleged title, upon the faith of which the seizure had been made, was merely a pignorative contract, or a fraudulent simulation, entered into by her for the purpose of securing a debt due by her husband. The seizing creditors affirmed that the transaction was a sale, and also alleged that they had acquired judicial mortgages, which, in any event, they were entitled to enforce. It was held that, under the pleadings, the mortgage rights of the defendant could not be determined; that there had been no sale of the property; and that the alleged vendee had never taken possession; and, whilst it was intimated that there might be some difference between the rights of a judicial, and of a conventional, mortgage, the matter was merely referred to, *en passant*, and the intimation was not made the basis of the judgment.

In the Succession of Manson, the facts were, that one of the banks in New Orleans foreclosed a mortgage for \$5000, and the property was adjudicated, upon the bid of its counsel, and merely as a matter of convenience, to its cashier, who was not informed of it until afterwards, when, upon the same day he executed an instrument in the form of a

counter-letter, declaring that he had no interest in the property. It was made known later, however, that there had been previously recorded against him a minor's mortgage for a large amount, and the purpose of the suit was to free the property so adjudicated therefrom. It was held that, under the circumstances, the minor's mortgage ought not to be held operative against the property.

The case of *Douglas vs. Douglas* was not unlike that of *Broussard vs. Sheriff*, the decision having for its basis an utterly void transaction whereby the property of a married woman was made to appear the property of her husband, and the question to be decided being, whether the creditors of the husband's heir, who were not shown to have acted upon the faith of his supposed ownership, should be allowed to appropriate it to the payment of their claims. There is no doubt some language in these opinions which sustain the views which have been here considered, but we are of opinion that its application should be confined to the cases in which it was used, it being much safer, at times, to reason from general propositions to particular cases, than the reverse.

Our answer to the first question, then, is "Yes."

And we think that the law and the reasoning which lead to that conclusion require that we should answer the second question by saying that judicial mortgages recorded against the owner of record prior to the registry by him of the sale of the property prime all such mortgages recorded against the vendee, whether the latter be recorded before or after the former.

NICHOLLS, C. J., dissents.

BREAUX, J., dissenting, handed down a separate opinion.

No. 13,891.

CITY OF NEW ORLEANS VS. HUGO H. FREDERICKS.

SYLLABUS.

ON MOTION TO DISMISS APPEAL.

Where, in an action for the recovery of real estate, the defendant, by his answer, denies the asserted right of the plaintiff, and, in the course of the trial, exhibits a title in himself, and at the same time disclaims title in the land, but insists upon his ownership of the buildings situated thereon, and there is judgment rejecting plaintiff's demand and recognizing defendant as the

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owner of the buildings, the value of the land is not thereby eliminated for the purposes of appeal, and a motion to dismiss, predicated upon that theory, will not prevail.

ON THE MERITS.

It is inadmissible that a political corporation exercising governmental functions should be dispossessed, by means of a tax suit against an individual, of a public work, not upon private property, constructed at the common expense, for the protection of the lives and property of its citizens. And it is a matter of no importance for the purposes of such a question whether, as between such corporation and other governmental authority, such work has, or has not, been properly located.

A PPEAL from the civil district court, parish of Orleans—*King, J.*

Frank B. Thomas, assistant city attorney (*James J. McLaughlin*, of counsel), for plaintiff, appellant.

Charles Louque, for defendant, appellee.

The opinion of the court was delivered by

MONROE, J. The city of New Orleans sues to recover certain real estate described as "A certain lot of ground designated by the number 9 and situated in the seventh municipal district of the city of New Orleans, in the tract of land known as West End, and fronting on the revetment levee in the said seventh district, and measuring seventy-five feet front by one hundred feet in depth between parallel lines." The petition alleges that the property in question is worth \$2500, and that the petitioner has been the owner in possession for more than ten years; that notwithstanding the fact that it is public property not liable to taxation, it was erroneously assessed in the name of Mrs. Mary Mullen, who occupied as lessee, under a lease transferred to her by M. J. Carroll, who had leased from petitioner.

That said property was sold under the erroneous assessment aforesaid about August 7, 1896, to Hugo Fredericks, who was put in possession by judgment of the civil district court in June, 1897, as against said lessee, Mrs. Mullen, and with reservation of petitioner's rights. There is a prayer for citation of the board of assessors, of Hugo Fredericks, of Mrs. Mullen and her husband, and of the state tax collector, and for judgment annulling the assessment, sale, and judgment mentioned, and decreeing petitioner to be the owner of said property and putting it in possession of the same.

The defendant, Fredericks, excepted on the grounds that the peti-

tion failed to disclose the title of the city, and that the suit, being one to annul a judgment, should have been assigned to that division of the court by which the judgment was rendered, and the latter exception having been maintained, the case was transferred to that division. The defendant, Fredericks, thereupon answered, denying that the city had any title and denying its right to annul a judgment to which it was not a party; and the other defendants pleaded the general issue. In the course of the trial on the merits, the city filed an amended petition alleging "that her title to this property was acquired by reason of the fact that the said property is a part of the bottom of Lake Pontchartrain, having been raised to the surface in the construction of the protection levee; that it is far beyond the shore line of the said lake, and, being part of a public levee, constructed for public purposes under the supervision of the city and at her cost, the said levee being built to protect the city; that all the bottom of the lake which was raised to construct the levee is the property of the city and said lot forms a portion of said levee, the city having no written title thereto, except in so far as the creation of the levee board and the drainage commission may be considered as such."

The concluding paragraphs of the reasons assigned for judgment by the judge *a quo* read as follows: "The city has shown no title to the property described in the petition. The defendant has shown a deed of sale to the buildings, not to the lands. Defendant's counsel, in argument, disclaims ownership of the land. Upon filing a written disclaimer, judgment is rendered in favor of defendant for the buildings only, reserving the rights of the Drainage Board, the Orleans Levee Board, and the city, if any she has, to bring suit and have it decided whether or not the building is a nuisance."

The disclaimer referred to was duly filed, and reads in part: "On motion of Charles Louque, attorney for defendant, and on suggesting to the court that the defendant disclaims ownership of the lot sued on for the reasons that the same is the bottom of Lake Pontchartrain, and is not, as such susceptible of private ownership," etc. And thereupon judgment was entered, rejecting plaintiff's demand at its costs, and recognizing the defendant, Fredericks, as the owner of the improvements on the lot in question. From this judgment the plaintiff has appealed, and the said defendant moves to dismiss the appeal on the ground that the building of which he was recognized to be the owner was never worth as much as \$1000, that it has been destroyed by fire,

and that there is nothing left in contestation. This motion is supported by affidavits, filed in this court, showing the value of the building to have been as stated in the motion, though they do not refer to its destruction by fire, or otherwise. The city, upon the other hand, has filed affidavits to the effect that the property *claimed in the petition* is worth \$2500.

It was shown by the evidence adduced upon the trial that, between 1872 and 1874, the city of New Orleans, at its own expense, and with material obtained from the bottom of the lake, built a levee, something over 2000 feet in length, extended westward from a point near the mouth of the new canal, and at a distance of 800 feet out from the southern shore of Lake Pontchartrain, the idea at the time being to extend the work and to do certain other work with a view to the drainage of the city and to its protection from inundation. The scheme, as a whole, was abandoned and little or nothing more was done than the building of the levee in question, which is not connected with the shore at either end, and is therefore washed on both sides by the waters of the lake. There is no doubt, however, that this levee has been under the exclusive control and administration of the city since it was built, and in the exercise of that control, the city appears to have divided its two edges into lots, with its crown as a roadway between them, and the water, either of the lake, proper, or of the channel between the levee and the shore, in their rear; the particular lot here in controversy being upon the inner edge of the levee and designated as lot No. 9. In May, 1883, the city leased this lot to M. J. Carroll for twenty-five years for the sum of \$100 and for the further consideration that Carroll should cause to be erected thereon a building and other improvements, according to a plan to be furnished by the city surveyor, which building, etc., were to become the property of the city at the expiration of the lease. We infer from the evidence that Carroll erected the building as contemplated by his lease, and he appears to have sold and transferred the lease and the building to Miss Minnie Wilson, who, in turn, sold and transferred to Mrs. Mary Mullen. In June, 1896, the property, that is to say, the lot as heretofore described, was sold to Hugo H. Fredericks by the state tax collector as property which had been adjudicated to the state for the state tax of 1890, and, later in the same year, Fredericks obtained a writ of possession, the execution of which was enjoined by Mrs. Mullen, who claimed to be in possession as the transferee of the lease to Carroll. There was judgment

against her, which appears to have been affirmed by the Court of Appeal. Thereafter, in May, 1897, the city of New Orleans filed suit alleging ownership and possession and praying that it be protected by injunction, and its demands were also rejected with a reservation of its "rights, in a petitory action or in a proper proceeding, to set up any title" it might have. Following this, Denis Casey, claiming as sub-lessee under James Mullen, at a rental of \$150 per year, applied for an injunction to maintain him in possession, and the same was denied, and Fredericks was, presumably, put in possession. The city thereupon, in March, 1898, brought the present action.

ON THE MOTION TO DISMISS THE APPEAL.

The facts disclosed do not justify the dismissal of the appeal, since the allegations of the petition and the affidavit in support thereof to the effect that the property claimed, *i. e.*, the building and lot, is worth \$2500, are not overborne by the affidavits filed on behalf of the defendant as to the value of the building alone. The fact that the defendant, in the course of the trial, disclaimed title to the lot, cannot, for the purposes of the appeal, affect the question of the value in dispute in as much as no judgment was rendered and no action was taken by the city whereby its claim was curtailed, of its original proportions. "That," as has been said by this court in a somewhat similar case, "was only accomplished by the final judgment," from which the appeal has been taken. *Blache vs. Aleix*, 15 Ann. 50. The motion to dismiss is, therefore, denied.

ON THE MERITS.

The defendant, who, claims under a tax title based upon an assessment made by the Board of Assessors, and under a sale made by the state tax collector, for the parish of Orleans, is hardly in a position to deny, whatever may be the fact, that the property in question is within the limits of this parish, and hence within the limits of the city of New Orleans. The city acted either upon that hypothesis or upon some other basis of actual, or assumed, right, when it built and took possession of the public work of which that property formed, or was made, part. Whether the city required the permission of any other authority to build a levee in Lake Pontchartrain, to protect itself from inundation, or whether it did not, is a question of no importance

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here. The facts are, that the levee was built for the purposes stated; that it was a public work in the actual possession of the city authorities, as such, and that it was not subject to taxation. Hence, there could have been no valid sale of the lot 9 for taxes. But the original lessee of the lot had an interest in the buildings thereon upon which he was liable for assessment, as upon any other property, and when the original lessee transferred that interest, it became liable to assessment as the property of the transferee, and to sale for the tax assessed, and there was no reason why the defendant Fredericks, should not have become the owner as a purchaser at such sale. This was, however, a matter which did not particularly concern the city, and it is only in so far as the tax deed purports to convey the land, and in so far as there has been a denial of the city's authority as the administrator of a public work, if not as owner and lessor, that it has any right to complain, since the purchaser of the building acquired no greater rights as to the land than the owner of the building had possessed under his contract with the city. To the extent stated, however, the city has a right to complain. Nor do we think that, in determining as to the merits of the complaint which has been made, it is necessary that either the Levee Board, the Drainage Commission, or any other authority need be made a party to the litigation. Those who are not made parties will not be affected by the judgment. It is sufficient for present purposes that we take the case as we find it. And, so taking it, we hold it to be inadmissible that a political corporation exercising governmental functions should be dispossessed, by means of a tax suit against an individual, of a public work, not on private property, constructed at the common expense for the protection of the lives and property of its citizens.

It is, therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed in so far as it rejects the demand of the plaintiff to be put in possession of "lot number 9, situated in the seventh municipal district of the city of New Orleans, in the tract of land known as West End, and fronting on revetment levee in said district and measuring seventy-five feet front by one hundred feet in depth between parallel lines," and that there now be judgment in favor of the plaintiff, annulling and avoiding the adjudication of said lot, as made by Blayney T. Walshe, state tax collector, to Hugo H. Fredericks, upon the 10th day of June, 1896. And it is further ordered that the plaintiff be put in possession of said lot,

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subject to the rights of the defendant, the said Hugo H. Fredericks, as owner of the buildings thereon with respect to which and to all other matters, save costs, said judgment is affirmed. It is further ordered and adjudged that said defendant pay the costs in both courts.

No. 14,420.

ROBERT J. PERKINS, RECEIVER, vs. JEAN LAPEYRONNIE.

SYLLABUS.

Query—Where the principal and surety on a conventional bond are joined as defendants in a case in which judgment is asked against the principal in a sum exceeding \$2000 and against the principal and surety *in solido* for a sum less than \$2000 (the surety's obligation under the terms of the bond being less than \$2000) and in which case a judgment is rendered against the principal and surety, *in solido*, for \$390, to which appellate court—Supreme or Court of Appeal—must the appeal taken by the surety be carried?

Held—To the Court of Appeal.

CERTIFIED from the Court of Appeal, Parish of Orleans, by the Judges thereof applying for instructions.

The opinion of the court was delivered by

BLANCHARD, J. Samuel J. Humphreys was the secretary of the Jefferson Building Homestead Association and, as such, gave bond for the faithful discharge of his duties in the sum of one thousand dollars, with J. M. Lapeyronnie as surety.

The association went into the hands of a receiver.

The latter instituted suit against Humphreys and Lapeyronnie, alleging a breach of the bond on the part of Humphreys and consequent damages to the association in the sum of \$5,000.00.

Judgment was prayed for against Humphreys in the sum of \$5,000.00, and against the surety, Lapeyronnie, *in solido*, to the extent of \$1,000.00—the amount of the bond.

There was judgment in favor of the plaintiff and against Humphreys and Lapeyronnie *in solido* for \$390.00.

The surety applied for and obtained an order of appeal to the Court of Appeal for the Parish of Orleans and duly lodged the record of appeal in that court.

It does not appear that any appeal to any court was taken by Humphreys, nor has the plaintiff applied any where to have the amount awarded him increased.

Ex proprio motu the judges of the Court of Appeal raise a question as to the jurisdiction of their court, and propound the following:

Where the principal and surety on a conventional bond are joined as defendants in a case in which judgment is prayed for against the principal in a sum *exceeding* \$2,000 and against the principal and surety *in solido* for a sum *less* than \$2,000 (the surety's obligation under the terms of the bond being less than \$2,000) and in which case a judgment is rendered against the principal and surety *in solido* for \$390.00, to which appellate court—Supreme or Court of Appeal—must the appeal taken by the surety be carried?

We answer:—to the Court of Appeal, whose jurisdiction extends to all cases, civil or probate, where the matter in dispute or the funds to be distributed shall exceed one hundred dollars, exclusive of interest, and shall not exceed two thousand dollars, exclusive of interest. Constitution 1898, Art. 98.

Quoad the surety, the suit was on the bond for \$1,000.00, alleging breach thereof by the principal.

From the bond sprang the obligation *in solido* of the principal and surety to the extent that they therein bound themselves.

The judgment was for an amount within the bond, *in solido*, against the signers thereof.

One of the judgment debtors, to-wit:—Humphreys, the principal on the bond, as against whom a sum was also demanded over and above and beyond the bond, does not appeal.

So far as he is concerned the amount claimed of him in excess of the bond, outside of it, was rejected and the plaintiff acquiesces.

So far as judgment was awarded against him within the limit of the bond, he acquiesces.

We are not to assume either may yet appeal.

The *status* of the case, then, as it appears on appeal is one upon the bond, which is for \$1,000.00, and for an amount as to which no one complains but the surety, who is appellant, and who could not have been sued and was not sued for an amount beyond the appellate jurisdiction of the Court of Appeal.

"But," it might be asked. "had the plaintiff appealed where would his appeal have been taken?"

We answer, to this court as to the \$5,000.00 he claimed from Humphreys, and to the Court of Appeal as to the \$1,000.00 he claimed from Lapeyronnie *in solido*. In which event the Court of Appeal would have postponed action upon its branch of the appeal until this court had acted, and then have been guided in its judgment by the action taken in the case against Humphreys here.

If, for instance, on such an appeal, this court decided Humphreys was due nothing to plaintiff, it would follow that the Court of Appeal would enter up a judgment of release in favor of Humphreys' surety, who was sued on the bond, as to which the superior court had, necessarily, decreed, in releasing Humphreys, no breach.

If Humphreys had appealed, his appeal would have come to this court because he was sued for more than \$2,000.00—a sum beyond the jurisdiction of the Court of Appeal. The appeal of his co-defendant, sued for less than \$2,000.00, would go to the Court of Appeal and there await the action to be taken by this court on the Humphreys' appeal.

Thus, a conflict of jurisdiction would be avoided, and each court would entertain the appeal as to which its jurisdiction attached under the authority of the Constitution.

It is only in cases where there is an appeal from a judgment rendered on a *reconventional* demand that the appeal lies to the court having jurisdiction of the main demand. Const. Art. 95.

We cannot stretch the authority of this Article to give this court jurisdiction of an appeal on an original demand for less than \$2,000.00 against one defendant, because of the fact that his co-defendant is sued for a sum exceeding \$2,000.00, even though the obligation of the former be dependent on a case being made out against the latter.

If it be said that the plaintiff and Humphreys have both the right of devolutive appeal for twelve months from the date of the judgment in the court below; that one, or the other, or both, may exercise this right and bring the appeal to this court; and that this court may render a judgment on such appeal, as between the plaintiff and Humphreys, different from the one which, meanwhile, the Court of Appeal may have rendered between the plaintiff and the surety Lapeyronnie on the appeal taken to it by the latter, we answer that while this is possible it is not probable, and even though this should be the case, the surety will have had "his day in court" before the tribunals, original and appellate, appointed by the laws of his country to deter-

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mine his liability *vel non*, and would not be in a position justly to complain that the judgment of the Court of Appeal as to him is *res judicata*.

If it would be such were he cast, so it would be such were the plaintiff cast on the appeal to the Court of Appeal.

In such case, of appeal by Lapeyronnie to one court, and, later, of appeal by Humphreys or the plaintiff to another, the appropriate tribunal, vested with jurisdiction by the Constitution according to the amount sought to be enforced against each defendant, will have sat upon the two branches of the case and reached judicial determination of the issue submitted respectively.

It may be an involved situation, an awkward arrangement, and it appears to be such, but for this the Constitution, not this court, nor the Court of Appeal, is to be held responsible.

The conclusion herein reached as to the jurisdiction of the Court of Appeal is supported by *Villars vs. Faivre and Mathews*, 36 La. Ann. 398-401.

There defendant Faivre and his surety and co-defendant Mathews were sued *in solido* for \$900 on a bond for that amount executed to obtain the release of some property of Faivre's which had been sequestered in a former proceeding, and in the same suit plaintiff asked a further judgment against Faivre individually for \$3,600.

Plaintiff having been cast, an appeal on the whole case was prosecuted to this court.

On the suggestion of want of jurisdiction over the demand for \$900 against Mathews the surety, the court said Mathews could not be held for more than \$900, and the amount involved as to him was unquestionably the test of jurisdiction on appeal as to his interest in the litigation. It, therefore, dismissed the appeal in so far as it concerned the judgment in favor of Mathews.

It is ordered that the Court of Appeal for the Parish of Orleans assume jurisdiction of the instant case and proceed to the determination thereof.

No. 14,255.

JOHN J. WATT VS. D. B. WILLIAMS.

SYLLABUS.

Defendant had written to a real estate agent informing him of his willingness to sell a tract of land at a stated price.

Two years afterward, without communicating with defendant, and when it was apprehended by this agent, who informed plaintiff that there was reason to infer that he, defendant, would not accept the price offered, the agent undertook to sell the property and bind the defendant although he had not been specially authorized to sell the property.

When defendant received the letter informing him of the action of the real estate agent, he did not approve or decline. Shortly afterward it became known from defendant that he was not willing to sell at the price offered.

Plaintiff had not deposited the whole amount of the price. He withdrew the amount deposited, which was less than the price, and plaintiff afterward sought to buy other lands. Having failed in the second attempt at buying lands, he sought to hold the defendant in damages. This claim for damages is too speculative and uncertain to serve as a valid basis for a judgment. Plaintiff acquired no title to the land he claims to have bought from defendant.

The fee of the curator, appointed to represent defendant in the attachment proceedings as fixed by the district judge, is not too large, and under a special statute the curator's fee may be increased to an amount corresponding with the value of the services.

A PPEAL from the Fifteenth Judicial District, Parish of Calcasieu
—*Miller, J.*

Cline & Cline, for Plaintiff, Appellant.

S. D. Read, Curator *ad hoc*, for Absentee, Defendant, Appellee.

J. W. Bryan and *R. P. Williams*, Intervenor and Appellees.

The opinion of the court was delivered by

BREAUX, J. Plaintiff, alleging that defendant failed to carry out his contract as vendor of land, he claims to have purchased from him, sues him to recover three thousand two hundred and forty dollars as damages. The alleged price of the land is sixteen hundred dollars, and August, in the year 1900, the date of the purchase.

We are informed by the record that D. B. Williams, who is a citizen of and resides in Great Britain, sold the land through the agency of a

Watt vs. Williams.

real estate firm of Jennings, La.; that in a letter from his home in Great Britain, addressed to this firm, bearing the date of January 28th, 1898, Williams informs this firm that he cannot accept five dollars an acre for the one-fourth mentioned in the letter which letter he had received from the firm, but that if the real estate firm could get five dollars an acre for the half section in one payment clear to himself he would sell, otherwise he wanted at least six dollars and fifty cents an acre for the northeast quarter of the tract with the usual conditions, and seven dollars and fifty cents an acre for the southeast quarter, and adds, copying *verbatim* from the letter, "Kindly list these prices."

Having left England and being in Canada, he, on April 8th, 1898, again wrote to this firm enclosing his address in case it, the real estate firm, wished to communicate with him in regard to the sale of his land. In this letter he describes his land as the E. $\frac{1}{2}$ Sec. 30, T. 7 S.

Plaintiff states that upon this authority the real estate firm offered the land, but owing to depressed conditions at the time this firm obtained no offers for the land at the price fixed by Williams until August, 1900, when it the price was offered by it to plaintiff, Watt, in a letter by it to Watt stating that in looking over its correspondence with David Williams it found that it set forth in its last letter to it (the letter last referred to by us) in regard to the half section, that if he could get five dollars an acre cash net to him he would sell, otherwise that he asked as the price of the northeast quarter six dollars and fifty cents, and the southwest quarter seven dollars and fifty cents per acre, on the usual terms. The firm in this letter to Watt said it supposed that the terms would be one-third cash, balance in one and two years, at 8 per cent. interest. It also states that it had not written to defendant, Williams, in accordance to promise made to plaintiff, Watt, to quote from the letter: "Because he certainly will take no less for it now and the chances are about nine to ten that if we write him he will put that land at ten dollars an acre, as it has been some time since he wrote us; while on the other hand, if you would be willing to close at these prices, we could close the deal and he would be obliged to make the deed."

In a few days Watt answered and said that he was willing to take the land at five dollars an acre for the east half, and three days after the firm in question wrote to Williams, the defendant, that it had sold the half section of land to plaintiff, Watt, for the price mentioned in the latter's letter, and requested Williams to make out the deed and send it to one of the banks at Jennings or direct to it (the firm), and upon its

receipt it would be signed by the buyer, that it held the amount of the price.

This firm added in this letter: "The China neighborhood (in which this land is) looks rather deserted on account of the failure of the 'providence rice' for so long; a great many of these people had left that country and moved to Jennings onto lands that are irrigated. Hope that you will attend to this at once," and instructions were given regarding stamps required on the deed.

Defendant swore that he had received a letter about June, 1900, from the real estate firm stating that it had received five dollars an acre from Watt for the premises described and that it was on deposit in the bank, but did not say that it had been placed in his (defendant's) name.

The China, not Asiatic China, but China sixteen miles northwest of Jennings, referred to in the letter, was not unknown to the defendant, as he had, at one time, been a resident at or near the locality. One copy of the letter was addressed to the defendant at a postoffice in Canada, where he had directed the firm to address his letters, and another to him in Great Britain.

The letter did not reach the defendant before the October following, by reason of the fact that defendant had changed his postoffice. He, Williams, answered acknowledging receipt, and stated that he would "attend to the matter in a few days."

Plaintiff says, in substance, that deep wells for irrigation purposes proved successful at and near China, La., and that a number of persons sought to buy rice lands and that, in consequence, the land he claims to have bought advanced in value, and that defendant doubtless learned of the rapid enhancement in prices, and that instead of signing a deed to him (Watt) he sought to convey it to B. F. Coffall, on December 4th, 1900, for the price of seven dollars per acre; that plaintiff, hearing of this, withdrew the amount he had deposited with the real estate agent, and then it became evident to him that he could not buy land of equal value to the land in question for less than twelve dollars per acre; that finding that Williams refused to confirm the sale made by the real estate firm to himself, he (Watt) filed suit on March 25th, 1901, claiming damages; that the suit was dismissed on exception of no cause of action, and that then plaintiff filed the present suit.

An attachment was issued against the land and a curator *ad hoc* appointed. The curator first filed an exception, which was referred to the merits, and then his answer was filed.

Coffall and the real estate agent intervened in the suit, and to their petition of intervention, plaintiff filed an answer. There was judgment for the defendant, and intervenors and plaintiff appeals.

Exceptions to rulings are urged upon our attention by plaintiff; that he was not permitted to prove an arrangement which he claimed to have made with the agent he assumed had authority, and in the second place that he was not permitted to prove the agent's acceptance of the arrangement.

As we do not consider that the real estate agent had authority to bind the defendant, we are not of the view that if the evidence had been admitted it would have a controlling bearing on the issues. The amount allowed the curator for his services gave rise to another issue.

Plaintiff submits that nothing should be taxed against him but the ten dollars. The statute also leaves it to the discretion of the court to increase the amount in proportion to the services rendered. And as to the fee the advocate is entitled to ten dollars as a fee—and on proof the court may increase the amount in proportion to the services rendered. R. S. 108. The amount does not appear large. We do not think it should be reduced on appeal.

We are not convinced that consent was given by the defendant, the asserted vendor of the plaintiff, to the extent and in the manner required. He had, by letter to a real estate firm, expressed the willingness to sell the land at a price he mentioned. About two years after the real estate agent had received this letter he conceived the idea that it would be possible for him to sell the land and accordingly communicated with plaintiff, in terms which manifested a pronounced desire to effect the sale of the land of defendant. Plaintiff consented, and his contention is that he deposited the price of the land. It remains as a fact that there never was a delivery of the price in the manner required to enable the defendant to call upon any one for an amount deposited to his credit. If a right had been acquired by plaintiff to the title it devolved upon him to complete the sale as far as he was concerned by depositing the price or offering to pay the sum representing the price.

The defendant had not bound himself to sell the land to plaintiff through the agency of any one. No one was authorized to sign the deed or to bind him as a vendor. Plaintiff, and the real estate agent, made no attempt to close the sale outright, but the deed was sent to the defendant at his home in England to be signed and on its receipt defendant did not sign and return it, but wrote that the matter would receive

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his attention at once. We are not of the opinion that this was an acceptance in law, although, as a matter *in foro conscientiae* it should be different. Later, he declined to sign, and sold the property to another, whose claim is set forth in a petition of intervention.

There never was between plaintiff and defendant an absolute offer to sell on the part of the latter to the former and an acceptance of the offer. The *consensus in idem placitum* is wanting between these two. The asserted agency through which it is contended he bought has not so acted under the circumstances as to bind defendant. They (the agency in question) were not given the control of the property. Plaintiff says that he went into possession under authority received from this agency to go into possession. They had no authority to place him in possession. In fact he never went into actual possession.

Although some little doubt may hang over the issue between plaintiff and defendant, there can be none as to the title of the intervenor whose right begins at a date prior to any recorded deed. True, the deed under which they own was passed after letters and *ex parte* declarations had been filed, and even if it had been passed after the suit of plaintiff had been brought, the letters and declarations were not deeds or equivalents to deeds. They did not convey notice of a sale and the intervenors cannot be held to have had the notice required to legally warn them not to buy.

The suit between the plaintiff and the defendant is not such a notice of itself as the law requires.

As we take it intervenors had no knowledge of the pending suit and they had the right to transact on the face of the record in the clerk's office.

The law and the evidence being in favor of the defendant and intervenors, the judgment appealed from is affirmed.

No. 14,369.

M. L. SWORDS, SHERIFF AND EX OFFICIO TAX COLLECTOR, vs. JOSEPH DAIGLE.

SYLLABUS.

1. The law requiring Police Juries to publish their estimates of expenditures during thirty days preceding the imposition of the tax, applies as well to license as to *ad valorem* taxation, and is not substantially complied with, as to the former, when the license ordinance is adopted at the same

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meeting as the estimate, although the *ad valorem* tax ordinance may not be adopted until after the expiration of thirty days.

9. Where, under the law, license may be imposed upon the retail liquor business, either for revenue or by way of police regulation, or for both purposes, the question as to what is the *main* purpose is one the solution of which depends upon the circumstances surrounding the imposition of the license. And where it is imposed by the same ordinance as the licenses for revenue, it would be a strained construction of the law to single it out and hold it to be in the main a police regulation, and hence valid, and at the same time, to hold the others to be intended for revenue, and invalid, merely because the liquor license is higher, and the business of liquor selling is subjected to some restrictions not imposed upon other callings.

A PPEAL from the sixteenth judicial district, parish of St. Landry—
Lewis, J.

W. J. Sandoz and E. B. Dubuisson, for plaintiff, appellant.

Charles Frederick Garland, for defendant, appellee.

The opinion of the court was delivered by

MONROE, J. The plaintiff claims from the defendant \$2100 for state and parish licenses, as retail liquor dealer, during the year 1900 (being \$2000 for the parish, and \$100 for the state, license), with 2% per month interest from March 1, 1901, and 10% upon the aggregate amount as attorney's fees. The defendant admits that he owes the state license, and deposits the same in court with interest, penalties and costs. He denies that he owes the parish license, for the reason, as he avers, that the police jury did not publish its estimate of expenditures for thirty days, as required by law, before adopting the license ordinance, but, on the contrary, adopted said estimate and ordinance at the same meeting, and that the ordinance is, therefore, void.

The fact is, as stated in the answer, that the budget of expenses and the license ordinance were adopted at the same meeting, to-wit: the meeting of December 5, 1900. This was followed, upon January 22, 1901, by the adoption of the ordinance imposing the *ad valorem* parish tax for the year.

Section 2745 of the Revised Statutes requires the police juries of the different parishes to adopt and publish their detailed estimates of expenditures at least thirty days before meeting to decide upon the taxes to be assessed.

It has been held that this law is mandatory, and not directory, and

that an injunction will lie to restrain the collection of taxes imposed in violation of its provisions. *Wilson vs. Anderson*, 28 Ann. 261. It has also been, specifically, held that it applies to license taxes imposed upon liquor dealers, and our predecessors in this court have said:

"The powers conferred upon police juries relative to the licensing of drinking saloons are very ample. There is, however, a restriction upon the power of police juries to lay taxes of any kind, the application of which is invoked here. Before a police jury can lawfully meet and decide on the amount of taxes to be assessed for a current year, it must cause an estimate of the parish expenses to be made, and published at least thirty days before it decides on the amount of taxes to be raised.

* * * * *

"It is a wise law that requires the taxpayers to be advised of the intention of the police jury to assess a certain sum upon them, and their property; to fix an aggregate amount to be raised by taxation in any given year. It advises them of the *quantum* and objects of burthens that are about to be imposed upon them for parochial purposes, and gives them an opportunity to exercise a healthful and restraining influence upon their local legislature. We are not disposed to relax the rule which has been imposed upon the police jury, even if we had power. The imposition of the tax was illegal, because the estimate of the expenditures had not been published."

Parish of Lincoln vs. Huey, 30 Ann. 1244. See also *Police Jury vs. Bouanchaud*, 51 Ann. 866; *State vs. Lockett*, 52 Ann. 1620; *Constant et als. vs. Parish of East Carroll*, 105 La. 286.

The learned counsel representing the plaintiff argue that there was a substantial compliance with the law, in, that the ordinance imposing the *ad valorem* tax was adopted in accordance with its provisions—i. e., after thirty days' publication of the estimate. This argument would be as strong if the case were reversed, and the ordinance imposing the *ad valorem*, instead of that imposing the license, tax had been adopted at the same meeting as the estimate, and, if accepted as the basis of jurisprudence, would produce the singular result that a law, which, by its terms, applies to all taxes, would be held to apply in one case only to license taxes and in another only to *ad valorem taxes*. It is also contended that the license in question is not a tax, and, hence, not within the meaning of the provision of the law which we are now considering, but is a police regulation. There is no doubt authority for the proposition that the police power may be exercised through the medium of the

power of taxation, and that, in such case, it is not subject to the limitations imposed upon the latter. But, whether in a given case the *main* purpose of an ordinance imposing a liquor license is to obtain revenue or is that the ordinance shall operate as a restraint upon the traffic in liquor, is a question the solution of which depends, where either hypothesis is admissible under the law, upon the surrounding circumstances. In the instant case, assuming that the police jury of St. Landry might, legally, have imposed the license for either purpose, or both, the amount fixed and the prohibition of the issuance of licenses for less than that amount, and against the carrying on of the business without license, suggest the idea of a police regulation. Upon the other hand, for aught we know, the parish may have found that it collects more money, at less expense, with high licenses than with low, and, as the liquor license was fixed by the same ordinance by which the revenue licenses were fixed, and as we know that the latter were not intended as police regulations, it would be a strained construction, merely because of the prohibition mentioned, to single out the liquor license as a police regulation, and therefore validly imposed, and yet to hold, as we should be compelled to hold, that the other licenses, imposed by the same ordinance, were invalid.

Upon the whole, we concur with the views expressed by our learned brother of the district court, and the judgment rendered by him is
Affirmed.

No. 14,243.

C. A. BURNHAM ET AL. VS. POLICE JURY OF CLAIBORNE PARISH.

SYLLABUS.

1. The boundary line of a taxing district is designated with sufficient certainty by the following language: "Starting from the northeast corner of the northeast quarter of the southeast quarter of section 18, and running thence three miles west on the section line to the northwest corner of the northwest quarter of the southwest quarter of section 14." The *termini* and the direction of the line are unmistakable. The phrase, "on the section line," is shown by the context to have the meaning of parallel with the section line.
2. In considering the question of whether compliance with Section 11 of Act 81 of 1888 requiring school boards to divide their parishes into school districts, was sufficiently formal, regard must be had to the connection in which the question is mooted, whether in connection with the mere distribution of school funds, or in connection with the exercise of the taxing

power, a much less strict compliance being sufficient in the former than in the latter case.

2. Residents of a school district who do not show that their own children are incommoded, or that their taxes are increased, by the manner in which the boundaries of a school district have been fixed, are without interest and therefore without right to resist a tax levied in the district, on the ground that the boundaries have not been so fixed as to accommodate the children of the parish.

A PPEAL from the Third Judicial District, Parish of Claiborne.—
Edwards, J.

Richardson & Richardson, for Plaintiffs, Appellants.

McClendon & Seals, and *James Edward Moore*, for Defendant, Appellee.

The opinion of the court was delivered by

PROVOSTY, J. The School Board of the Parish of Claiborne having created a school district known as the Haynesville School District No. 11, and a tax having been voted in said district for the use of the school therein, the plaintiffs, who are resident taxpayers of the district, bring this suit to have said tax decreed null and void.

The only grounds pressed upon our attention are, first, that the School Board was without power to create said district until the entire parish had precedently been divided into districts, and that this division of the entire parish has never taken place; second, that the north boundary of the district is not fixed with sufficient precision; and, third, that this school district was not so formed as best to accommodate the children of the parish.

The first ground is sought to be sustained under Section 11 of Act 81 of 1888, which reads, as follows:

"Sec. 11. That it shall be the duty of the Parish Board, with the Parish Superintendent, to divide the parish into school districts of such proper and convenient area and shape as will best accommodate the children of the parish. The Parish Board shall, as soon as practicable, proceed to the work imposed upon them, and upon completing this work, they shall make a report to the Parish Superintendent, which report shall contain the boundary and description of the said district designated by number. The Parish Superintendent shall record the same in a well bound book, kept by him for the purpose,

which book shall be held by said Parish Superintendent and be at all times open to inspection. The Parish Board, if they deem it to the best interest of the schools, may divide the parish into districts without reference to the wards in the parish."

It seems that the nearest the School Board of Claiborne Parish came to complying with this law was to pass a resolution each year locating the schools by wards, and directing the Superintendent to apportion the school fund among the wards. In answering the question whether this was a sufficient compliance with the act, regard must be had to the connection in which the question is mooted: if merely in connection with the distribution of the school fund of the parish, required by Section 7 of the same Act to be apportioned among the several districts, we should say it was a sufficient, though an extremely informal and slipshod compliance; but if in connection with the creation of school districts for the purpose of taxation, we should say emphatically that it was not a sufficient compliance. Had the School Board of Claiborne Parish taken no further action than the above for the purpose of creating the district wherein has been imposed the tax resisted in this case, we should unhesitatingly have said that the district had not been created in a manner sufficiently formal to meet the requirements of the legal situation. Except in connection with and for the purpose of a distribution of funds this general division of the parish is not required and if the proceeding for the creation of the particular taxing district in question are sufficiently formal, we do not see what ground there can be for complaint.

The regularity of the proceedings for the creation of the school district in question, is not denied by plaintiffs, except in the two respects already pointed out, namely, that the entire parish was not divided, and that the north boundary of the district was not designated with sufficient precision or certainty.

The northern boundary is, we think, designated with sufficient certainty. It is said to start from the northeast corner of the northeast quarter of the southeast quarter of section 18, and to run "thence three miles west *on section line* to the northwest corner of the northwest quarter of the southwest quarter of section 14." Were the words, "*on section line*" left out of this description, the same would be as precisely accurate as language could make it; but it is said that the presence of these words renders the designation of the line uncertain, as it is not possible for the line to run from the one to the other of the

points fixed for its *termini*, and yet run on the section line; that it would have to run on the quarter section line. So evident is this that the words "on the section line," can impart no ambiguity to the other descriptive words made use of. The proposition "on" has an almost inexhaustible variety of meanings. One is, "conforming to or agreeing with; as, on the line." (Cent. Dict., Vo. On, 3, b.) Hence the proposition may be used to express relative, as well as absolute position, and we think that the context sufficiently indicates that in this case it is used to express mere relative position so that the meaning is that the line shall run *parallel* with the section line. To give it the other meaning would create not ambiguity only, but contradiction. It is not to be supposed that the Police Jury intended that the line should occupy two positions.

The learned judge *a quo* properly ruled out all evidence on the question as to whether the boundaries of the district had been so fixed as to accommodate the greatest number of children. Plaintiffs, who are residents of the district, have no interest in urging the complaint; by this alleged improper fixing of boundaries their own children are not incommoded, and their taxes are not increased. It will be time enough to consider the question when the parents or guardians of the excluded children complain. Though, we surmise, it will then probably be found that the matter of fixing the limits of school districts has been confided by the statute to the School Boards, and that the discretion thus confided cannot be controlled by the courts.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be affirmed at the costs of the appellants.

No. 13,934.

G. H. RUSSELL vs. ALLEN & CURREY.

SYLLABUS.

1. In an action for damages the testimony shows that the moulding machine is not considered a dangerous machine.
2. What instructions should be given to all workmen in charge of machines, the extent of the instructions and the warning to be prudent, are to be gauged by the necessity because of danger.
3. The *onus* of proof is with the plaintiff. The foreman swore that he did not put plaintiff in charge of the machine.

Russell vs. Allen & Currey.

4. The workman who had charge of the machine just previous to the accident, and who gave up his charge to the plaintiff, swore that before leaving this machine, he gave full instructions to the plaintiff.
5. All the witnesses, save plaintiff, testify that it was a matter of physical impossibility for the accident to have happened in the way alleged in plaintiff's petition and as he claims.
6. The witnesses swore that the wooden strip, while being worked through the moulder, will never jerk back into it and throw the hand in the interior of the moulder into the blades of the lower cylinder.

A PPEAL from the First Judicial District, Parish of Caddo.—
Land, J.

Alexander & Wilkinson, for Plaintiff, Appellee.

Thatcher & Welsh, and Wise & Herndon, for Defendants, appellants.

The opinion of the court was delivered by

BREAUX, J. Plaintiff, in his own right and for his minor son, sues to recover the sum of seven thousand, six hundred and ten dollars for the loss of three fingers, while the latter, the son, was working for defendant at their planing mill in Shreveport.

Plaintiff avers that his son was employed as lumber carrier and stacker; that he was ordered by the foreman to assist another young man in operating a moulding machine which was dangerous; that its appliances were not properly protected to the end of preventing the happening of accidents; that skilled workmen only should be employed in such work; that his son knew nothing about moulding machines, and had always previously engaged in work not dangerous; that he was put to work without instructions regarding the dangerous work he was to perform.

Defendant answered the petition, and denied all of plaintiff's averments of negligence, and specially alleged that the injury complained of was caused by the gross carelessness of plaintiff's son.

Plaintiff's son, the injured party, was in his eighteenth year. He was inexperienced and had never worked at the moulding machine until a few minutes before the accident happened. He had, for about a month and a half, worked for the defendant. One of the employees of the defendant testifies that on the morning of the accident, and just prior to it, the foreman directed him to call on the son of the

plaintiff to assist him in carrying strips to the rip saw. After this work had been done and the strips prepared for the moulder, they were taken by him to that machine to be moulded into proper shape.

The moulder is a machine, operating mostly of itself. The workman at the moulder feeds or supplies the pieces of timber. This is done by pushing the small pieces or strips between the rollers. He, the workman, stands at the head of the machine and the feeding is done by pushing the strips between the rollers revolving toward the instrument referred to as knives, being blades attached to heads or cylinders. The blades near the front or head of the machine trims and smooths the top of the strip and gives it shape on one side and the other head or cylinder is near the end of the machine and planes the lower side of the strip, that is, cuts and makes smooth the lower or bottom surface. We are informed that usually a moulding machine has four heads or cylinders, one in front and another at the tale end, as just mentioned, and one on each side. The functions of the side heads or cylinders is to trim the sides when such trimming is deemed necessary.

The testimony shows that there were no blades on the side cylinders, and it follows that they were not in operation when the accident happened, only the front and rear blades were in operation.

From the time that the rollers clutch the slip with which they are supplied or fed by the workman in front of the machine, until it passes through the machine ordinarily, no necessity arises to touch the internal part of the machine. The moulder has a board which is known as the pressure board, that is set or fixed, stationary, immediately above the knives and extending beyond them.

The son of the plaintiff took the place of the man at this machine, and alone, without experience, undertook the work of operating it. The strips which were being run through the moulder were about fifteen feet in length. He testified that the one whose place he took, put one strip through the machine in his presence, and then said to him that in this work he had to run three or four strips through the machine and then to step to the back or rear of the machine and see if the strips were smooth; that he complied with this instruction, and while in the rear or back of the machine, he took hold of the strip as it was being revolved out of the moulder and while he had his hand on the strip, the machine jerked the strip back, and also his hand, throwing it onto the blades by which his hand was severely cut; that is, he was holding the strip with his left hand, and the machine in some way

slipped back, and pulled his hand into the knives or blades before mentioned as being at the tail end of the machine.

With reference to the employment of the plaintiff's son at the moulder, and as to the instruction given to avoid the accident, the testimony is contradictory. No good reason suggests itself for us to conclude that he should not have undertaken the work at the moulder. A fellow workman turned the work over to him and went elsewhere to perform other work. This was done, plaintiff's son testifies, with the knowledge of the foreman. We have before stated that the testimony regarding the instruction was conflicting. Plaintiff is flatly contradicted by the young man who left him in charge of the machine as just stated. As this is an important point, we deem it proper to dwell at some length upon the facts, of which this is a summary:

Just before the accident, Harry Bryan, a fellow workman said to plaintiff that he must help in getting some strips ready for the moulder machine; that the foreman said that he, plaintiff, must help him, Bryan, the fellow workman.

Plaintiff says that, passing by the foreman, he inquired of him if he had given the order as stated by Bryan and that the foreman answered "Yes." Plaintiff swears that he and Bryan moved strips from the rip-saw station to the moulding machine; that they commenced to work at the machine and immediately after Bryan turned over the work to him of feeding the moulder machine; that Bryan directed him to run three or four of the strips through the machine, and then to leave the front and step to the back of the machine and see if the strips were of the required smoothness. It was in doing this that he was maimed as before stated.

Plaintiff testifies that he did not receive any special instructions. Bryan, on the other hand, testifies that he gave him complete instructions; that he specially pointed out every part of the machinery and warned him not to put his hands near the cylinder. This witness said, "I showed him how to start the moulder, and how to stop it, and how to feed it, and I said to him 'George, be sure to keep your fingers out of the feed rolls.' I showed him the rolls and the heads. I said to him, 'There is the head'" (or cylinder.) "After I had shown him all about it, he started to feed the moulder, and I watched him run two or three pieces through the machine, and I went to the shop to do other work."

Evidently, the jury did not believe this witness and did believe plaintiff. This is unusual.

We will state here, that all the witnesses agree that a skilled workman is not required to operate this machine. It is not considered a dangerous machine, and no witness recalled that any accident of a serious nature had ever happened while operating it. An experienced mechanic testified, "I have taken them younger than that and put them to work on moulders, and they have made good feeders. None of them ever lost their fingers while working on moulders.

This brings us to the last point in the case. At several different times, while testifying, plaintiff stated that at the moment of the accident he was standing behind the machine; that he laid his hand upon the strip of wood that was being run through the machine to see if it was smooth enough. His hand was jerked back and thrown against the knives. All the other witnesses who testified upon the subject said that this was not possible, and gave their account of why it was not possible. As this, in our view, is the most important point in the case, we insert excerpts from their testimony.

L. C. Allen, one of the defendants, testified:

"I do not believe that his hand could get into the cylinder from the side and be cut in that manner."

W. S. Curry, the other defendant, said:

"It would be impossible for that piece of moulding to be jerked back into the machine. There is no force to drive it back against the self-feeding apparatus, and the hand could not slip into the space onto the knives."

The foreman testified that after an experience of some fifteen years in handling those machines, he never knew of any accident prior to this one happening to the feeder of the machine; and further, standing at the tail of the machine grabbing the strip with the left hand, it would be absolutely impossible for the strips, by being jerked back, to draw the hand into the knives.

Another foreman of the defendant, in answer to the question whether such an accident was possible, as stated by plaintiff, said:

"No, sir; that is impossible" and gave reasons about similar to those given by the other witnesses.

Not one of the witnesses testified that it was possible for the accident to have happened in the way mentioned by plaintiff. There was no attempt made to rebut the testimony on this point.

From the verdict, we infer that the jury concluded that in any event the defendants were liable, and that this conclusion is based

State vs. Preston.

upon the theory that plaintiff was not properly instructed; that it makes no difference, in view of that fact, whether plaintiff's account of the accident is or is not correct; that it was due to a want of instructions for which the defendants are liable. We find ourselves unable to agree with their conclusion. The fact that plaintiff is contradicted by defendants' foreman; that he is contradicted by his fellow workmen; that he is contradicted by the facts regarding the possibility of receiving a wound in the manner he states, renders it, we think, impossible to reconcile the testimony sufficiently to support a judgment.

A close attention to the issue and a careful review of contradicted statements at important points, results in forcing upon us the conclusion that plaintiff has not sustained his cause sufficiently to enable us to affirm the verdict.

For the reasons assigned, the verdict and judgment of the District Court are annulled, avoided and reversed at the cost of plaintiff in both courts.

Rehearing refused.

No. 14,404.

STATE OF LOUISIANA VS. ED. PRESTON.

SYLLABUS.

The record failing to disclose that the accused was arraigned, or that he pleaded to the indictment, or was called upon to plead, the verdict and sentence cannot stand.

A PPEAL from the Fifteenth Judicial District, Parish of Calcasieu
—*Miller, J.*

Walter Guion, Attorney General, and *Joseph Moore*, District Attorney, for Plaintiff, Appellee.

Charles C. Egan, for Defendant, Appellant.

The opinion of the court was delivered by

BLANCHARD, J. The accused was indicted for shooting with intent to kill and murder.

Tried by jury, he was convicted of shooting with intent to kill, and sentenced to imprisonment at hard labor for twelve months. He appeals.

It is absolutely essential to the validity of a verdict of conviction that the accused should be arraigned before put upon trial.

There was no arraignment in this case. The record shows none. And there was no waiver of arraignment, even if it could be waived. There was, therefore, no issue joined between the prisoner and the State, and the verdict and sentence cannot stand.

State vs. Epps, 27 La. Ann. 227; State vs. Revels, 31 La. Ann. 387; State vs. Ford, 30 La. Ann. 311; State vs. Christian, 30 La. Ann. 367; State vs. Chenier, 32 La. Ann. 103; State vs. Hunter, 43 La. Ann. 157; State vs. Fontenette, 45 La. Ann. 902; State vs. McMichael, 50 La. Ann. 428.

The fact that no legal verdict had been found, for want of arraignment of the defendant, was called to our attention by the Attorney General, who asked that the sentence of the lower court be set aside for that reason.

It is ordered that the verdict and sentence appealed from be set aside and annulled, and that the case be remanded to be proceeded with according to law.

No. 14,216.

F. M. JOPLING VS. T. C. CHACHERE ET ALS.

SYLLABUS.

The confirmation by the old Board of Commissioners for the Western District of the Territory of Orleans, under the Act of Congress of 1807, of a claim to land based upon occupancy and settlement followed by the confirmation by Congress of the claim so confirmed, operated as effectually as a grant or quit claim from the government. The ownership of the confirmee to the land was not held in abeyance until a patent issued. The patent was simply documentary, recognitive, evidence of the existence of the confirmed title. Property so confirmed became, from the date of the confirmation, subject to State taxation.

2. The mere failure of a tax collector to make, in his deed, recitals of fact which it would have been proper for him to have made, does not render the tax sale to which it refers, *ipso facto*, an absolute nullity, and open as such to a collateral attack, nor does such fact destroy the good faith of the purchaser in taking possession of and holding the property as owner under it.

107 522
 110 94
 111 587
 107 522
 112 220
 112 789
 112 792
 107 522
 118 850
 120 497

Jopling vs. Chachere et als.

3. The existence of a defect in a tax sale, resulting from a defect in the assessment of the property, does not deprive the sale from being made the basis of the prescription of ten years, where defect is a latent one, which the purchaser was not called upon to ascertain or know.

A PPEAL from the Eighteenth Judicial District, Parish of Acadia—
DeBaillon, J.

Edward L. Wells (Boatner, Dodds & Boatner, of Counsel), for Plaintiff, Appellant.

Gilbert L. Dupré, W. C. Perrault and W. J. Sandoz, for Defendants, Appellees.

Removed by writ of error to the Supreme Court of the United States.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff's prayer in this action is that he be decreed to be the owner of the property which he describes in his petition.

The defendants are Theodore C. Chachere and John P. Boagni, who are alleged to be "trespassing upon said land and claiming to own and be in possession of same by pretended titles, originating prior to the issuance of the patent from the United States, but not from Bennet Jopling, in whose name the patent issued, nor from his heirs or heir."

He alleges that he is the owner of the land by purchase from James H. Houston, Jr., who purchased from the only surviving heir of Bennet Jopling, deceased. That the United States, on July 16th, 1900, issued its patent confirming to Bennet Jopling and his heirs title to said land. That said land was acquired under and by virtue of an act of Congress, approved March 3rd, 1807, and predicated upon the treaties of the United States of America.

He introduced in support of his title, first, an act dated the 22nd day of June, 1900, executed by James H. Houston declaring himself to be the agent and attorney in fact of James H. Houston, Jr., by which the latter, through said agent, sold to the plaintiff for the price of five hundred dollars (without warranty, the purchaser taking the title as it was with a tax title against it) all his rights, claims, title and ownership in and to the land which plaintiff claims in this litigation. In this act it is recited that the land was the same land acquired by the vendor from

J. W. Jopling by act passed before William J. Sandoz, notary public, on *June 15th*, 1895, and duly recorded.

Second—An act *sous seing prive* dated *18th of June*, 1895, between James W. Jopling and James H. Houston, Jr., acknowledged on the same day before John H. Wells, clerk of the court of Hardin County, State of Kentucky, which act was declared on the 24th of June, 1895, by W. J. Sandoz, notary public, to have been produced before him, and the signature of James H. Houston, Jr., to said act duly acknowledged to be his signature in the presence of the witnesses thereto.

In this act James W. Jopling declares that he sells and conveys with full warranty to James H. Houston, Jr., all his rights and titles, interest and demands in and to a certain tract of land situated in the Parish of Acadia, State of Louisiana, containing eight hundred and ninety-eight and ninety-eight-hundredths acres, more or less. (Spanish grant, No. 41, township seven (7) south, range one (1) east. See parish map and a list of private land claims where above described property is well defined as belonging to Bennet Jopling.) The price of the sale was fifty dollars.

Third—A patent from the United States dated July 16th, 1900, in favor of Bennet Jopling, his heirs and assigns. The patent recites that it was granted in accordance with the provisions of the act of Congress of the third of March, one thousand eight hundred and seven. It declares there had been deposited in the general Land Office of the United States a patent certificate numbered fourteen hundred and ninety-nine, issued by the register and receiver of the United States Land Office on the twenty-fifth of May, one thousand nine hundred, whereby it appeared that the private land claim of Bennet Jopling being number one thousand nine hundred and twenty-seven, Class B. in the report of the old Board of Commissioners for the Western District of the Territory of Orleans, was confirmed by the said commissioners under the authority conferred upon them by the act of Congress approved on the 3rd of March, 1807, entitled "An Act respecting claims to land in the Territories of Orleans and Louisiana. That the claim had been regularly surveyed and designated as section forty-nine in township seven, south of range one west, and section forty-one in township seven, south of range one east of the Louisiana meridian, in the Southwestern District of Louisiana, containing eight hundred and seventy acres and six-hundredths of an acre, as appeared by a plat and descriptive notes on file (in the general Land Office) thereof, duly ex-

amined and approved by James Lewis, surveyor general for Louisiana, on the ninth day of May, one thousand nine hundred. That this plat and descriptive notes were inserted and made part of the patent.

The plat and descriptive notes referred to were signed, as recited, by James Lewis, surveyor general of Louisiana, on the 9th of May, 1900.

Immediately following the plat the surveyor general recites that it represents the survey of the private land claim of Bennet Jopling, confirmed by the old Board of Commissioners for the Western District of Louisiana, in pursuance of authority conferred upon them by the fourth section of the act of Congress, approved March 3rd, 1807, entitled "An Act respecting claims to lands in the Territories of Orleans and Louisiana, as appeared by their confirmation certificate No. B 1927, dated March 11th, 1812. After making this recital the surveyor general says: "The following being a description of the survey taken from the approved field notes of N. B. Phelps, deputy surveyor." He then gives the field notes of the survey.

At the end of the document, under date of May 9th, 1900, are the words "examined and approved," followed by the signature of the surveyor general.

Boagni answered, pleading first the general issue. He then averred that he had, by authentic act recorded in the Parish of Acadia on July 24th, 1900, purchased from Victor C. Sitting, in good faith and for a valuable consideration a tract of woodland situated in the Parish of Acadia containing five hundred acres, more or less, being part of section 41, township 7, south range 1, confirmed to Bennet Jopling by certificate B, No. 1927, bounded north by T. C. Chachere, south by heirs of J. C. Brooks, east by Bayou Mallet, and west by E. Veltin and Wm. Johnson, Spanish grant, acquired by his vendor at tax sale, made September 30th, 1871, recorded in St. Landry Parish and duly confirmed by the Auditor of Public Accounts on the 19th of May, 1874. That since the purchase of this land in 1871, his vendor had been in uninterrupted and continuous possession and in good faith of said tract, peaceably possessing the same. That he pleaded in bar of plaintiff's action the prescription of three, four, five, ten, twenty and thirty years. That the sale to him was made with full warranty of title, and he was entitled to have his vendor cited in warranty to defend the title, and he so prayed. In the event of eviction he prayed for a judgment for the restitution of the price and for the fruits and revenues he might be obliged to return to plaintiff, for cos's and for all damages which he

might suffer by reason of plaintiff's action. Chachere answered, pleading, first, the general issue.

Further answering, he averred that on the 29th of May, 1882, he purchased in good faith and for a valuable consideration from Victor C. Sitting, by authentic act duly recorded in the Parish of St. Landry, the property which he described, containing four hundred and thirty-five acres, more or less, being part of the land purchased at tax sale, made by D. C. Sitting, tax collector, in 1871, said land being in section 41, township 7 south, range 1 east. That he had in good faith uninterrupted, peaceable and actual possession of the same since the date of his purchase.

That since the date of his purchase he had paid the taxes thereon at the rate of thirty dollars per year; that he had enclosed the same by a fence worth \$750, and made improvements, which he recited. That he pleaded in bar of plaintiff's action the prescription of three, four, five, ten and twenty years. In the event he be not sustained in his defense he prayed that if there should be a decree divesting him of his property, that before he be made to surrender the property, plaintiff reimburse him the amount of taxes he had paid, and the full value of the improvements he had placed upon the property.

Victor Sitting, called in warranty, answered the call in warranty on the 20th September, 1901. He pleaded the general issue, further answering he averred that he had on the 30th of September, 1871, at a tax sale made in accordance with law, bought certain property, which he described, at that time in the Parish of St. Landry. That he took possession of the land immediately after purchasing the same, and continued in good faith and uninterruptedly and peaceably until May 29th, 1882, when he sold one-half of said land for a valuable consideration to Theodore C. Chachere. That from that date he continued in possession of the other half in good faith and uninterruptedly and peaceably up to the time that he sold the same to John P. Boagni on July 24th, 1900.

That his title was duly recorded in the Parish of St. Landry, and the tax sale made to him by the tax collector was duly ratified by the State Auditor, and his ratification duly recorded in St. Landry, on June 13th, 1874. That he had paid taxes on the property while in his possession of six hundred dollars. He pleaded in bar of plaintiff's action the prescription of three, four, five, ten and twenty years.

In the event his title should be set aside and his plea of prescription not sustained, he prayed in reconvention and alternatively for judg-

ment against plaintiff for six hundred dollars, and that payment of same be made before plaintiff should be permitted to take possession.

The District Court rendered judgment decreeing that the claim of the plaintiff be rejected at his costs. That the plea of prescription set up by the defendant be sustained and that they be quieted in their possession of the land described in plaintiff's petition.

Plaintiff individually and as administrator of the succession of Bennet Jopling appealed.

OPINION.

The plaintiff urges that the defendants are trespassers upon the land, and this claim is based upon the theory that until July, 1900, at which date the United States Government issued a patent in favor of Bennet Jopling, his heirs or assigns, the property in question was the property of the United States.

We do not think there is any dispute between the parties as to the facts.

That on the 12th of March, 1812, the Board of Commissioners appointed under Section 4 of the act of Congress, approved March 3rd, 1807, confirmed to Bennet Jopling, under certificate No. 1927, by *virtue of occupancy and settlement under Joseph Chevalier Poirer* nine hundred and thirteen and ninety-eight-hundredths acres of land in Bayou Mallet woods, in the County of Opelousas.

That on April 29th, 1816, Congress, reciting the various acts bearing upon the subject (Act of March 10th, 1812; Act of February 27th, 1813, and Act of April, 1814), passed an act for the confirmation of certain land claims in the Western District of the State of Louisiana, and that under Section 4 of that act it was enacted "that the claims marked 'B,' described in the reports of the Commissioners for the Western District of the State of Louisiana, formerly Territory of Orleans, and recommended by them for confirmation, be and the same are hereby confirmed." That the claim of Bennet Jopling, covered by certificate No. 1927 of the Board of Commissioners, was confirmed in favor of Jopling by that act of Congress. That, although the claim was so confirmed by act of Congress, no patent was issued for the land by the United States Government until July, 1900.

It is contended in behalf of the plaintiff that until this patent was issued the ownership of the land and the title thereto was in the government of the United States. That the resulting effect of this fact

was that no rights of ownership to third parties could be based or predicated upon Jopling's having any ownership or title to this property prior to the issuance of the patent, nor could any obligations which Jopling may have come under, either to individuals or the State, strike this land or be enforced upon it until a patent for the same had issued. The defendants deny the correctness of this proposition.

The defendants maintain that not only was the claim confirmed by act of Congress, but the land was surveyed and officially located as far back as 1856, under a survey and field notes which had been submitted to and approved by the then surveyor general of the United States for the State of Louisiana.

The plaintiff does not deny that, as a fact, this was the case, but he insists that the evidence in the record does not disclose the *date* of the survey of the claim made by Phelps, or of any approval of his survey and field notes by a surveyor general of the State, prior to James Lewis' approval in 1900, and they maintain that even if such survey had been made and approved by the surveyor general, the survey and approval were inoperative and of no virtue and effect until acted upon in the form of a patent. The following points are made in the syllabus of plaintiffs' brief:

1. A patent is the highest evidence of the divestiture of title of the government, and one relying upon prescription accruing before the issuance of such patent, must show a prior divestiture or his plea cannot be maintained. 12 Ann. 151.

2. Until the patent issues, prescription does not run against the government and its grantees. *Gibson vs. Chouteau*, 13 Wallace, 92; *Burgess vs. Gray*, 16 Howard, 48; *Oaksmith vs. Johnson*, 92 U. S. 343; *Meguire vs. Tylor*, 8 Wallace, 650; *Sparks vs. Pierce*, 115 U. S. 408; 113 U. S. 271; 47 Ann. 579; 132 U. S. 239.

3. Private land claims in the Territory of Louisiana, which had not ripened into complete grants before the cession, required survey, confirmation by the Board of Commissioners, the approval of the Secretary of the Treasury, confirmation by act of Congress, and patent. Such survey should be made under the directions of the surveyor general and be approved by him in order to segregate private land from the public domain. 47 Ann. 579; 13 Ann. 390; 12 Ann. 151; 10 Ann. 133; 9 Ann. 154, 438; 5 Ann. 75, 558; 4 Ann. 99; 3 Ann. 86; 5 N. S. 35; 132 U. S. 239; 16 Howard, 48; 3 Ann. 787; 15 Peters, 75, 184, 215, 319; 16

Peters, 159; 21 Wallace, 521; 4 Sawyer, 536; 3 Sawyer, 66; 16 Wallace (Dent vs. Emmeger), 308.

4. Where such incomplete grants have not been identified and determined to cover a definite location, or are subject to conflicting rights, the land is not liable to taxation. Am. & Eng. Ency. of Law, Vol. 25, page 111, and authorities there cited; 95 U. S. 259, Colo. Co. vs. Comrs.

5. A tax sale of property belonging to a person, notoriously dead long years before the assessment, is null. Stafford's case, 33 Ann. 520.

6. A tax sale which neither recites the assessment, nor any of the formalities required by law, and unaided by proof *aliunde* as to its correctness, is absolutely null and void. Rapp vs. Lowry, 35 Ann. 1275; Lambert vs. Craig, 45 Ann. 1109.

Defendants' counsel submit to the court the following propositions and authorities:

1. The rights of a State to tax lands which have, or may have, belonged to the United States does not depend on the actual issuance of a patent, but on the complete and perfect right of the claimant to demand one. Saunders on Taxation, page 403; Howard (U. S.), page 440; Carroll vs. Stafford; Railroad Co. vs. Prescott, 16 Wallace, 603; Railroad Co. vs. McShane, 22 Wallace, 444; Simien vs. Perrodin, 35 Ann. 931; 4 Ann. 137; Am. & Eng. Ency. of Law, Vol. 19, pages 332-333 and 334; Cooley on Taxation, pages 59 and 60.

It is at this stage (when the right to demand a patent has been vested in the purchaser or claimant) that the land ceases to be the property of the United States and becomes that of the pre-emptor or claimant to such an extent, that it is liable to taxation by the State in which it lies. Am. & Eng. Ency. of Law, Vol. 19, foot notes, page 334.

Where the right to a patent has once become vested in a purchaser of public land, it is equal so far as the government is concerned to a patent actually issued. The execution and delivery of the patent after the right to it has become complete, are the mere ministerial acts of the officers charged with that duty. Barney vs. Dolphe, 97 U. S. 652; Starks vs. Starrs, 6 Wall. (U. S.) 402. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. Moran vs. Horsky, page 212 of the opinion; 178 U. S., Confirmation of Grants by Congress.

A legislative confirmation of a claim to land is a recognition of the validity of such a claim, and operates as effectually as a grant or quit claim from the government. A patent issued thereunder adds nothing

to the force of the confirmation. It is merely documentary evidence, having the dignity of a record of the existence of the confirmed title. *Langdeau vs. Whitney*, 88 U. S. 521; *Morrow vs. Whitney*, 95 U. S. 551; *Whitney vs. Morrow*, 112 U. S. 693.

If a survey of the land is required the title becomes perfect as soon as made. 88 U. S. 531.

The surveyor general in each State is required to cause to be surveyed all private land claims within his district after they have been confirmed by authority of Congress. Revised Statutes of the United States, Sec. 2223.

A survey having been made in this case by Noah H. Phelps, United States deputy surveyor, the presumption is it was made in pursuance of the above requirement, and this presumption is conclusive until overcome by proof to the contrary. *Am. & Eng. Ency. of Law*, Vol. 19, page 49, first edition; *Stephen's Digest of the Law of Evidence*, Art. 101, and authorities quoted in the brief; 35 Ann. 1038, *Cole vs. Thompson*; 9 Peters, 118; 34 U. S."

In passing upon the questions raised in this case, it will be seen at once that there is no issue between the parties based upon a claim that loss or injury has been occasioned by the Jopling claim having been left after its confirmation by the board and the action by Congress upon the confirmation in an uncertain condition as to its location. No conflict of interests has arisen between different parties by reason of the non-issuing of a patent. All parties admit that Bennet Jopling was entitled to the confirmation of his claim, both from the Board of Commissioners and from Congress, and none of the parties contest, but all admit, that the location of the claim as shown by the survey and field notes attached to and made the basis of the patent is correct. Defendants admit the original ownership of Bennet Jopling to this land. Neither the United States Government nor any one claiming under it adversely to the Jopling confirmation in regard to the land now in controversy is before the court. It is not claimed that there ever has been any adverse claim to it as a whole, though there was at one time a conflict as to a part of the land, other than that involved herein between the Jopling claim and that of one or two other claimants. The conflict did not extend to any portion of the land now in litigation. The Board of Commissioners was not called upon in dealing with Bennet Jopling's claims to act upon a mere "floating" right held by Bennet Jopling entitling him generally to locate land—such a right, for instance, as he

It is evident that Poiret was shown to the board to have *already occupied and settled a particular body of land for the time stated* and to have *already had an existing right or privilege to a particular tract*. The identity of the tract confirmed must have been fixed by evidence before the board and the survey which followed was unquestionably based upon that evidence preserved and made known to the surveyor. The Jopling claim under Poiret was not based upon the survey, but the survey was based upon the existing claim, and simply identified the land to which Poiret and Jopling were entitled by antecedent occupancy and settlement. The rights of Poiret and Jopling did not originate in the action of the Board of Commissioners and that of Congress. Their action was simply recognitive and declaratory, as the word confirmed used in connection with it plainly shows. The government practically and substantially never claimed this land as belonging to it and as forming part of the public domain. The confirmation was in the nature of a quit claim or relinquishment by the government of any right or interest in the land claimed. The title of Poiret and Jopling

under him was a title other and different from one which would have been held by either under a conditional sale to them of a part of the public domain under a homestead or similar right, where the title was to remain in the government until everything had been done by the vendee or transferee, which the government exacted from him as a condition of obtaining ownership. In such cases the patent and the right of ownership of the land described in it were merged in each other, because, as it were, one and the same, but in the case of a confirmed title, there was no such merger. The right which was confirmed continued throughout separate and distinct, and antedating completely the patent which evidenced not the right, but authentic evidence of the recognition of the right by the government.

Neither Jopling nor his heirs could disconnect themselves so far as they were concerned from their claim of ownership of this land, under Poiret's rights in order for their private purposes to refer the origin of their right of ownership to the patent which the government issued recognizing their right *ab initio*. The plaintiff here is contesting the already acquired rights of their own asserted author. Jopling and his heirs became the absolute owners of the land *which was occupied and settled by Poiret prior to the confirmation*, against the government itself and every one under it from the date of confirmation by Congress. In case any contest should arise prior to the issuing of the patent, the matter would have to be determined by the introduction simply of evidence. The confirmer could call for a government survey, if one had not already been made, and sustain his rights under the confirmation upon such survey, independently of a patent. If, however, a survey of the claim was necessary in order to complete the transfer of ownership of this property to Jopling, we are satisfied that a survey of the same was made and approved by the surveyor general, W. J. McCulloh, as far back as 1856. The present surveyor general of Louisiana refers to the survey and field notes of Phelps as having been approved, but not as a matter of original approval by himself, as the plaintiff seems to contend. In the act of sale of this land under which the plaintiff claims from James W. Jopling to James H. Houston, Jr., the land transferred is referred to as a "Spanish grant," with the added words (see parish map and a list of private land claims, where the above described property is well defined as belonging to Bennet Jopling). We have before us a copy of the parish map here referred to with the different private claims (among others that of Bennet Jop-

ling) distinctly set out and the surveys on which they were located minutely detailed, certified to as far back as 1856 by the surveyor general. It may be that it is not strictly and technically in evidence, but it is before us by reference in one of the acts, and were we not to act upon it the only effect would be to remand uselessly the case in order to have it formally introduced.

This sale of the property from James W. Jopling to Samuel H. Houston, Jr., was made on the 18th of May, 1895, antedating by several years the issuing of the patent which the plaintiff now insists was essentially necessary to convey title either to Bennet Jopling or his heirs. Plaintiff claims by purchase. If James W. Jopling had any rights in this property they were not original, but derivative rights, derived through and under the confirmation of Bennet Jopling. We are of the opinion that the property in question became the property of Bennet Jopling from the moment his claim was confirmed by act of Congress, and became subject from that time in his favor to full rights of ownership, and that it became subject also from that time to all the obligations which are incidental to property held in private ownership by individuals—among other obligations to that of State taxation.

We are informed by the record that the property was sold in 1871 to Victor Sitting in enforcement of State taxes assessed upon it in the name of Bennet Jopling and that the sale made was confirmed by the State Auditor in 1874, and that that act of confirmation was placed of record at that time in the Parish of St. Landry. That the tax purchaser, Sitting, and his vendees, Chachere and Boagni, have had actual corporeal possession of the property ever since 1871, the defendant Chachere holding title to a portion of the property by purchase on the 29th of May, 1882, and the defendant Boagni to the balance of the property by purchase on the 24th of July, 1900. The defendants have set up their respective titles and pleaded in bar of plaintiff's action the prescription of three, four, five, ten and twenty years.

The plaintiff urges that a tax sale of property belonging to a person notoriously dead long years before the assessment, and in support of this contention he cites Stafford's case, 33 Ann. 520, and further that a tax deed which neither recites the assessment nor any of the formalities required by law, and unsaid by proof *aliunde* as to its correctness is absolutely null, and in support of this proposition, he cites Rapp vs. Lowry, 35 Ann. 1275, and Lambert vs. Craig, 45 Ann. 1105.

The plaintiff did not attack by direct action the tax sale made of this

property in 1871, under which the defendants have held actual corporeal possession since that time. He ignored that sale altogether and brought a petitory action for the property. He filed no pleadings after the defendants had set up the tax sale of 1874 as the original source of their title, nor did he introduce evidence to break the force and effect of a tax deed. The fact of Bennet Jopling's death was accidentally brought out as having occurred many years ago, in connection with the administration of his succession, and his title to the property. The plaintiff testified that he himself was fifty-three years of age; that he knew nothing of Bennet Jopling except by reputation; that he died long before the witness could remember. The plaintiff, upon a collateral attack which he makes upon a tax sale nearly thirty years after it took place, relies upon its being held to be absolutely null and void by reason of the insufficiency of the recitals of the tax deed in respect to the observance of the legal formalities preceding the sale. Plaintiff is correct in his statement that upon a number of occasions we have declared that an assessment made in the name of a dead person is improperly made and carries with it the nullity of a tax sale based upon it, but that rule has its limitations and we do not think it can or should be applied in this case. It is a latent defect which the tax purchaser is not bound to ascertain or know. It is not one whose actual existence cuts him off from invoking good faith as a basis for the prescription of ten years *acquiritendi causa*.

We have just held that the property in question was in Bennet Jopling from the time of its confirmation by Congress, if not before.

That from that time it became subject to State taxation. All property in the State, independently of the question as to who is the owner of the particular property, is subjected to taxation and to expropriation for the purpose of carrying on the State government, though the State recognizes the individual rights of parties in property and has sought to prevent their divestiture in various ways.

It has enacted laws by which an assessment of property for purposes of taxation should be made annually commencing and closing at a certain fixed date. It has fixed the date of the delinquency of taxes and the time and place of tax sales. It has sought to give notice to parties interested in particular property by placing the names of such parties in connection therewith, as far as they could be ascertained, upon the assessment rolls, and in the proceedings connected with the tax sales, but it has cast upon owners the affirmative duty and obligation of mak-

ing themselves known by furnishing assessment estimates of their property to the State officials. Now neither Bennet Jopling nor any one claiming rights upon this property have ever (so far as the record shows) paid a dollar of taxes upon it, made any returns for assessment purposes or advanced any right or claim of ownership to it since the confirmation of title. Bennet Jopling, we are informed by the record, was a soldier in the Revolutionary War, and necessarily died many years ago. He and his heirs entirely disappeared. Their residence, even their existence, was unknown, but it did not follow from this fact that the property in Louisiana was not subject to assessment for and liability to sale for taxes. The law expressly provides for the assessment and sale of property of unknown owners, and the assessment and sale of this property as property of an unknown owner would have passed the title. The parties concerned would under such circumstances have received by mere description of the property itself no warning whatever of their interest in the subject-matter. They certainly have no reason, real or equitable, to complain that the name of the original owner, as shown by the record, should have been made to appear in the proceedings.

If the assessment and sale of the property as belonging to an unknown owner would have conveyed the title, plaintiff cannot urge now adversely to the proceedings the placing therein of the name of the original owner, a fact calculated to call the special and direct attention of the Jopling family to the matter. We think the case is covered by that of *Webre vs. Lutcher and Moore*, 45 Ann. 574, and *Michel vs. Stream*, 48 Ann. 341. Plaintiff is seeking to enforce a neglected and apparently an abandoned right to the ownership and possession of property, to the prejudice of parties who have been in possession of it nearly long enough to have acquired ownership of the same without any title whatever.

These particular parties, however, hold in good faith under titles derived originally through official proceedings taken out by State officers in the enforcement of the State's rights. They are not trespassers, as the plaintiff alleged them to be, nor were they originally trespassers. The mere conclusion of law to that effect announced by the plaintiff is backed by no fact. The mere failure of the tax collector in the deed to make recitals of fact which it would have been proper for him to have made does not render *ipso facto* the tax sale, to which it refers, absolutely null and void or destroy the good faith of the purchaser at the

tax sale in taking possession of and holding the property as owner under it. (Welsh vs. Augusti, 52 Ann. 1955.) The failure of proper recitals in a tax deed may bring about very serious trouble under some conditions and circumstances, but it does not carry, under the circumstances of this case, the legal results which the plaintiff contends for. In Michel vs. Stream this court said: "It will be seen that the Code recognizes the existence of an abandonment, as it were, of the right of even the right of constructive or civil possession resulting from ownership, not necessarily working an abandonment of ownership, but possibly modifying and affecting very materially the rights of the owner, though ownership may be retained and the possession resumed. This condition of affairs, if rights or claims of third parties under color of title should have intervened, may be attended with serious (sometimes insurmountable) difficulties."

"So long as the owner of property holds it in actual possession he occupies a position of great advantage as against adverse claims advanced against him. As he loses his grasp upon the possession he surrenders this vantage ground, and when in order to retake his own he should be forced to have recourse to judicial proceedings, he may find himself successfully met by pretensions which originally would have been held utterly without foundation or merit. Prescription *acquirendi causa* or *liberendi causa* may cut off the enforcement of his rights."

This is precisely what has happened here. The plaintiff occupies *quoad* the State and the parties holding under the State's title the status of an *unknown owner*, reappearing to assert neglected, abandoned rights to the prejudice of parties holding titles acquired from the State in good faith and holding actual possession under them for nearly thirty years. Plaintiff's claim is without equity. They cannot oust the defendants from property which they have bought, paid for and improved, while they have stood in the background until values have risen, to which they have contributed nothing. 145 U. S. 317; 45 U. S. 368; 178 U. S. 208.

We think the judgment is correct and it is hereby affirmed.

MONROE, J. I concur in the decree.

Rehearing refused.

NOTE.—This case was, subsequently, removed to the Supreme Court of the United States by writ of error.

No. 14,349.

STATE OF LOUISIANA VS. WARREN STAFFORD.

SYLLABUS.

1. There was no bill of exceptions and no assignment of errors, and the inspection of the record shows no error.
2. The fact that the defendant was asked by the trial judge if he had any statement to make prior to sentence was made to appear of record. The minutes were amended *nunc pro tunc*. The part of the record in which it appears was supplied through *certiorari*.

A PPEAL from the Second Judicial District, Parish of Bossier—
Watkins, J.

Walter Guion, Attorney General, and *T. T. Land*, District Attorney
(*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Joe E. Johnston, for Defendant, Appellant.

The opinion of the court was delivered by

BREAUX, J. On the 27th day of January, 1902, an indictment was found against the defendant charging him with having murdered Delia Stafford.

He was tried by a jury and found guilty as charged, and sentenced to suffer the extreme penalty of the law. No bill of exceptions was taken and no assignment of errors was filed.

After the record had been filed here an examination found that it did not appear of record that the defendant had been asked by the presiding judge, prior to delivering his sentence, if he had any statement to make why sentence should not be passed upon him.

To supply this a writ of *certiorari* was applied for by the Attorney General and was issued by this court. The district attorney of the district filed a rule (after the *certiorari* had issued) on defendant and his attorney to show that the accused was asked by the trial judge before sentence, "if he had anything to say why judgment should not be pronounced against him," and he asked that corrections in the minutes be made accordingly.

The defendant answered this rule and denied that the question had been asked and averred that justice could not be done without granting him a new trial. The trial judge in answer to this rule and in compliance with the writ of this court said that in open court just prior to sentence he asked Warren Stafford whether he had anything to say why the sentence of the court should not be passed on him. He further answered that he ordered an amendment of the minutes so as to show this fact *nunc pro tunc*.

Evidence was taken on trial of a rule to correct the minutes. Several witnesses were examined and it was shown that the question was asked as stated by the judge *a quo*. Before this court, the defendant, through counsel, urges that the proceedings had with the view of correcting the minutes are invalid: because the judge *a quo* did not determine or make the rule final; because the answer of the judge *a quo* (referred to above) and his affidavit is *ex parte* and was prepared and sworn to in Webster Parish three days before the rule was tried; because no issue has been decided.

Before taking up these grounds we will state that the purpose of the court was, in a case of this gravity, to comply with every formality, usual or unusual. We find this rule laid down in so far as our research went, only in Archibald, 7 Ed., note, p. 676, viz: "In capital cases before judgment is pronounced upon the defendant, it is necessary that he should be asked by the clerk of the court if he has anything to say why judgment should not be pronounced on him, and it is material that this appear on the record to have been done."

Returning to the objections here urged by the defendant, we think it sufficiently appears by the return that the rule was made final by the judge of the District Court by ordering the minutes to be corrected and stating substantially in his return under oath that the formality had been complied with originally and that the proper entry had not been made.

But defendant, in addition, sets up that no issue has been decided. The only issue was whether the facts warranted a correction of the minutes *nunc pro tunc*. To this the judge *a quo* returned an affirmative answer, and thereby the omission in matter of entry in the minutes was remedied.

The defendant further takes the ground that the proceedings were had prematurely and *ex parte*. True, the judge prepared his answer in another parish of his district, but in this and in the other complaints

Kaiser, etc., vs. Railroad Co.

in this connection we have not found ground to set aside the verdict and sentence.

We have examined the record carefully and have weighed the issues before us. There is no ground upon which we can possibly grant relief.

The law and the evidence being for the State and against the defendant, the judgment appealed from is affirmed.

No. 13,923.

CHARLES KAISER, ETC., VS. NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

SYLLABUS.

Where a boy of thirteen walks from one side of a street, on which there are double car tracks, towards the other side, at night, and, without stopping, collides with a car, blazing with light, loaded with passengers, and moving at the rate of six miles per hour, which there was nothing to prevent his seeing and hearing, there can be no recovery for injury resulting from such collision.

A PPEAL from the civil district court, parish of Orleans.—*Sommerville, J.*

Louis P. Paquet, and *Andrew J. Murphy*, for plaintiff, appellant.

Dart & Kernan, for defendant, appellee.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

MONROE, J. The plaintiff alleges that his minor son, for whose use and benefit he sues, had his foot cut off by one of the defendant's cars through the criminal negligence of the defendant and its servants, and he prays for damages. The answer is a general denial and a plea of contributory negligence.

The evidence shows that, upon the evening of February 21st, 1900, Peter Kaiser, the injured boy, with his older brother, Charles, left their home at the corner of Fourth and Franklin streets in this city,

with the intention of going to Canal street, in order to see an illuminated procession which was expected to appear.

They were city bred, intelligent, school boys, accustomed to electric cars and other perils incident to street travel, and were thirteen and fourteen years of age, respectively. Near the lower crossing of Perdido street, on Baronne, at about five minutes past seven o'clock, Peter Kaiser's right foot was crushed under the wheel of car No. 185 of the defendant's Jackson avenue line which was then going in the direction of Canal street, upon the eastward, or river, side track. The car was moving at about schedule speed and was carrying a large number (seventy, or more), of, registered, passengers, who were packed in the seats and the aisles and upon both platforms, and it seems likely that there were others, not registered, upon the bumper, outside of the rear platform, and hanging upon the hand rails, with their feet upon the steps of one, or both, of the platforms. Neither the conductor nor the motorman were aware, at the time, that any accident had occurred, nor can it be said that any of the passengers were aware of it, and the car proceeded on its way to Canal street. There seems to be no doubt that the little boy's foot was crushed by the front wheel on the left, or woods, side. Nungesser and Monaghan, two passengers, were occupying the front seat on that side, the former next to the aisle and the latter next to the window, which was open. Nungesser testifies that about Poydras street, one square above the scene of the accident, two boys caught on to the car, with their feet upon the step of the front platform, supporting themselves, no doubt, by hanging on to the after hand rail with their bodies swinging back, and that, as the position was one of peril, by reason of the fact that they were liable to be knocked off by a car going up on the parallel, and adjacent, track, the situation attracted his attention and he commented on it to Monaghan, and that, in passing Perdido street, he felt a jar and remarked, "There is somebody run over," to which Monaghan replied, "No, the car would have stopped." Monaghan's testimony is somewhat peculiar. He, at one time, appears to testify that the boys were on the car, and that Nungesser called his attention to the fact, but is afterwards unable to say whether they were there or not, and is unable to recall any conversation with Nungesser on the subject, though he fully corroborates that witness as to the remarks above quoted. Bonaparte, a negro boy, was standing on, or just inside, the sill of the rear door of the car, and testifies that, at Perdido street, he heard someone outside of the car

call out that a "boy got run over." Beyond this, there is absolutely no evidence that anyone on the car knew or suspected, or had any reason to suspect, that an accident had occurred. The story that the injured boy tells is fairly included in the following excerpt from his cross-examination—the first question referring to his starting from his home at the corner of Fourth and Franklin streets, to-wit: "Q. You walked on Fourth to Baronne and on Baronne to Perdido? A. Yes, sir. Q. Did you pass many of these electric cars on Baronne street? A. Yes. Q. There were plenty of boys hanging on the cars? A. No. Q. You did not see any people hanging on them on the back platform, or the front? A. No. Q. But you saw plenty of these cars coming down the street loaded with people, didn't you? A. Yes. Q. And you saw plenty of them going up town? A. Yes. Q. Both full of passengers? A. Yes. Q. On which side did you come down Baronne street? A. On the woods side. Q. When you got to Abbott's store, you looked in the window? A. Yes. Q. And you left your brother there and you went on by yourself? A. Yes. Q. Until you got the lower side of Perdido street? A. Yes. Q. Did you go on the crossing there? A. Yes. Q. What crossing? A. Down town crossing. Q. Did you walk or run over the crossing? A. I walked over. Q. You say you looked up and down the street? A. Yes. Q. What was that for? A. To see if a car was coming. Q. You knew that there was a car going to come there? A. Yes. Q. An you looked to see if the car was coming? A. Yes. Q. And you did not see it come? A. No. Q. And then you walked over? A. Yes. Q. Then what hit you, what was it that struck you? A. The car. Q. What part of the car struck you? A. The front part. Q. What part of the car, was it the woods side of the car? A. Yes. Q. The woods side? A. Yes. Q. Which way was your face turned when you were struck? A. Toward the river. Q. You did not hear the car? A. No. Q. And you did not see it? A. No. Q. And yet it hit you? A. Yes. Q. How came it that you did not see the car when it ran over you? A. I don't know. Q. There were electric lights burning in the car, did not the car have a headlight in front? A. Yes. * * * Q. How did you get your foot under the front wheel, you were not on the track? A. I had this foot right on the track. Q. When you were struck, you had one foot on the track? A. Yes. Q. You had only one foot on the track? A. Yes. * * * Q. You had just put your foot on the rail when

you were struck? A. Yes." Charles Kaiser testifies that Peter left him at Abbott's window and went on to Perdido street and that his attention was next attracted by the scream which followed the accident. He also testifies that he heard the witness Stagno call out, "There is somebody run over," and that the car went on. Both boys deny they had caught on to the car. Stagno testifies that he was walking down the middle of Baronne street, with his wife and child; that about half-way across Perdido street, he fell behind his companions and, being between the two Baronne street tracks, he saw a boy crossing from the lower woods corner of Perdido street; that he turned his attention from the boy and, a moment afterwards, heard a scream and found that the accident had happened. He refuses, however, to identify the boy who was crossing the street with the boy who was injured. This witness also testifies that he called out, "There is a boy run over."

Abovitch, who is the only witness, besides the boy himself, who professes to have seen the accident, was on the woods side of Baronne street, above Perdido, walking down. He undertakes to give the facts with considerable detail, but falls into several errors. Thus, he testifies, with great positiveness and reiteration, though his attention was repeatedly called to what he was saying, that the car which inflicted the injury passed him, going at unusually high speed, whilst he was in the middle of the square between Poydras and Perdido streets, walking in the direction of Perdido street, and, although he does not claim to have been walking very rapidly, he tells us that, when the accident occurred, on the lower crossing, he was within ten feet of the upper corner. This statement, he afterwards returned to the stand to correct, saying that he was twenty feet from the corner.

He also testifies that he observed that the number painted on the side of the car was 180, though, after the accident he could not have seen it, and, before the accident there was no reason why he should have observed it, as there were cars passing and re-passing every few minutes, and it is hardly likely that he noticed the numbers of all of them. Moreover, the number of the car was 185, whilst 180 was the number of the car that came up on the other track, and, because it was the only car that was stopped at the corner just after the boy had been picked up, was supposed by some persons to have been the car by which the injury was inflicted. This witness also testifies that no bell was rung on the car that ran over the boy, and, although Stagno, who was much

nearer, was unable, because of the darkness, as he says, to identify the boy who was injured with the boy whom he had, a second before, seen crossing the street in the direction of the car, Abovitch was able, whilst making the other observations which have been mentioned, to notice that Peter Kaiser had just extended his *left* foot forward on to the defendant's track when he was struck by the car.

Another witness, Marks, who was walking up Baronne street, on the woods side, and was a short distance below the corner of Perdido, speaks of having seen "the form of a boy tumbling into the street," near the passing car, and also of having seen a boy crossing, from the corner he, the witness, was approaching, in the direction of the point at which the "tumbling" took place, but there appears to have been no such continuity of observation as to enable him positively to identify the boy who was "crossing" with the boy whom he saw tumbling a moment afterwards. This witness also states that he was on his way to supper and was walking rapidly. Being asked, "How fast do you suppose you were walking—at what rate?" he replied, "About twenty miles per hour. Q. You were going pretty fast? A. Yes, maybe more than that," etc.

Ott, the conductor, testifies that he was on the rear platform; that, after passing Poydras street, his attention was called, by the driver of a passing wagon, to the fact that there was a boy hanging on the side of the car, or platform, at that end, and that he saw the boy and told him to get off. He also speaks of having seen a boy approaching the car from the woods side on Perdido street, and of having seen a boy standing between the tracks, but he states that he heard no one hail him and say that a boy had been run over, and he was not aware, at that time, and had no reason to believe, that an accident had happened. He further testifies that he has been a conductor for thirteen years.

Reiman, the motorman, testifies that the car was crowded; that there were four men on the front platform, to his left, and one to his right, but that they stood back so far as not to obstruct his view of the street. The car, he says, was going at the usual speed, i. e., "five points, or about six miles an hour," and that he was not aware, at the time, that any accident had happened. He was asked, "It is said that a boy about thirteen years of age tried to go across Baronne street, at Perdido, and that he was struck by the front part of the car, just as he put his foot on the rail, did such an accident happen to your car?" He answered, "No." He was asked, "Could it have happened without your knowing

it?" He answered, "No, it could not." He states that the four passengers to his left would have prevented his seeing a boy holding on to the "grab handle" of the front platform, and he does not know whether there was a boy so holding on. This witness was not in the employ of the defendant at the time that he testified. He had been a conductor for five years without causing damage to person or property and had left the service and had gone to work for a cistern-maker.

Perke is a motorman who was in charge of car No. 180, which was coming up Baronne street and had reached Gravier street, two squares below the scene of the accident, when the accident occurred. He testifies that as the down-coming car, being car 185, was leaving Perdido street, he saw a boy fall, and that as the car approached him he saw another boy hanging to the side, and called to him to get off. When he reached Perdido street, he slackened the speed of his car and heard somebody say, "That a boy had got his leg cut off," and some one took the number of his car.

Prester was the conductor of car 180. He also testifies that, on reaching Perdido street, some one said, "That was the car," referring to car 180, and that he then learned that an accident had happened. He also testified that there were boys hanging on to the car that passed down. This witness had likewise left the defendant's employ, after four years' service, with a certificate of good character, and was working elsewhere when he testified. It is abundantly shown that the car by which the injury was inflicted was brilliantly illuminated, with an electric headlight and some fifteen incandescent lights, inside, and it is not suggested that there was anything which could have prevented the boy who was hurt from seeing and hearing it for several squares.

OPINION.

There are but two, possible, hypotheses as to the manner in which the accident occurred: the one, that the little boy walked from the "woods" side of Baronne street toward the river side, that he crossed the defendant's up-town track in safety, and having made one step on to the down-town track, was struck by the car on that track; the other, that he and his brother were hanging on by the "grab handle" of the front platform of the car and that he fell off, or fell under the wheel after he had jumped off. And, upon neither hypothesis can the plaintiff recover. Accepting the statement of the little fellow himself, and taking the

view of the testimony most favorable to the claim which is made on his behalf, he walked, without stopping, from the banquette on the "woods" side of Baronne street, until he collided with the car or was struck by it. The moment before he took the one, and only, step which he had time to take on to the defendant's down-town track, it was entirely within his power to have stopped. And it was not to have been anticipated, in view of the fact that the car, blazing with light, loaded with passengers, moving at the rate of six miles per hour, and making a noise that could have been heard a square or two away, was practically on him, that he would have taken that one step which placed his foot beneath the wheel; nor, was it within the limit of human power, after that step had been taken, to have stopped the car in time to have avoided the accident, since the accident occurred before a second step could follow the first, and there is no great interval of time between the steps of a boy of thirteen, who is on his way to see a procession, the lights of which are reddening the sky just before him. We need not deal with the theory suggested on behalf of the defense that the boy was one of those who had been hanging on the car. Nor is it necessary that we should enter into any extended discussion of the supposed presumption of negligence arising from the fact that the conductor and motorman did not know that the accident had occurred, and failed to hear the calls afterwards. It seems to us to be reasonably certain, not only from the testimony of the defendant's, but from that of the plaintiffs, witnesses, that the boy was never in front of the car, where he might have been seen by the motorman, but that the point of collision was aft of the bumper and guard and just forward of the front wheel. As to the calls of Stagno and Marks, that, a boy had been run over, they were certainly uttered not only after the fact, but after those witnesses had had time to realize what had happened, and, in the meanwhile, the crowded car was speeding down the street. It is not surprising, therefore, that the calls were not heard or understood. The case was tried in the district court without a jury. The learned judge before whom it was tried reached the conclusion that the plaintiff was not entitled to recover. We are of the same opinion, and the judgment is accordingly affirmed.

No. 14,382.

STATE OF LOUISIANA VS. SAMPSON JOENSON.

SYLLABUS.

1. The charge of the court in a criminal case must be assumed in the absence of proper recitals, to have been given under circumstances warranting it.
2. Bills of exception should be submitted to the District Attorney for inspection prior to being handed to the court for signature.

A PPEAL from the Nineteenth Judicial District, Parish of Iberia—
Foster, J.

Walter Guion, Attorney General, *Anthony N. Muller*, District Attorney (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Broussard, Dulaney & Broussard, for Defendant, Appellant.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant appeals from the verdict of a jury and a life sentence in the penitentiary, having been tried under an indictment for murder.

The only bill of exception in the record is one taken to two detached sentences in the judge's charge to the jury, in which he said:

"No person has a right to kill another because he was invited to enter into his house, and to follow and kill him without cause or provocation, and if he does it is murder."

"No one has a right to assume that a party visiting his house is violating its sanctity and kill him without cause or provocation—if he does, it is murder."

The objection urged was that it was a statement to the jury touching facts and the view taken thereof by the judge.

The charge itself is not in the record. Counsel makes no statement as to the circumstances under which the court made use of these two expressions. The charge must be assumed in the absence of proper recitals to have been given under circumstances warranting it. We

Bank vs. Town of Jennings.

cannot reverse a verdict and sentence upon the showing made in this case. The words used could just as well have been harmless as injurious. The practice of taking bills upon sentences in a charge wrenched from the context, when it is so easy to require the entire charge to be made in writing and to place the whole matter before us, is calculated to work injury either to the State or to the accused.

The Attorney General and the district attorney object to the bill of exceptions taken. The latter claims that the bill should have been submitted to his inspection before being handed to the judge for his signature. We think this complaint well grounded. The State has a right to be heard before bills are signed. *State vs. Laborde*, 48 Ann. 1492.

We suggest to the district judges that before signing bills of exception they ascertain that they are presented to the district attorney.

The judgment is affirmed.

No. 14,228.

CITIZENS BANK VS. TOWN OF JENNINGS.

107 547
116 586

SYLLABUS.

The statute declaring that Police Juries and the constituted authorities of incorporated towns and cities shall not have power to contract any debt or pecuniary liability without providing in the ordinance creating the debt the means of its payment, is a prohibitory law, and such a limitation upon the power of Police Juries and municipal authorities that debts contracted in violation of its provisions are stricken with nullity and incapable of judicial enforcement.

I N RE. Citizens Bank Applying for *Certiorari*, or Writ of Review, to the Court of Appeal, Third Circuit, State of Louisiana.

Cline & Cline, for Plaintiff, Applicant.

Schwing & Moore, for Respondent.

The opinion of the court was delivered by

BLANCHARD, J. The writ of review having been allowed, this case is before us for determination on its merits.

A resolution was adopted by the Town Council of Jennings in the

year 1895 authorizing the purchase of two chemical fire engines, if found satisfactory after trial. The price agreed upon between the vendor and the town was \$1700, of which \$200 was to be paid in cash and the remainder in two years' time.

The engines were supplied and supposedly tested, for in March 1896 the Town Council passed a resolution accepting them, ordering the \$200, cash payment, to be made, and directing a warrant to be drawn in favor of the vendor for the \$1500 deferred payment, payable on or before twenty-four months.

The \$200 was paid and the Mayor of the town drew a negotiable note, payable to the order of the vendor, due at twenty-four months, with 7 per cent. interest from date, for \$1500.

This note was delivered to the vendor and subsequently transferred to the plaintiff herein, who brought suit upon it, praying judgment for its amount, with the interest stipulated, and claiming recognition of the vendor's privilege upon the engines.

The defense is that when the debt was created no provision was made for its payment, and that the municipal authorities of the town were without authority to bind the corporation by the issuance of any warrant or other evidence of debt except against money actually in the treasury. It was averred that the engines were long since tendered back to the vendor, and the answer repeats the tender to the plaintiff, assignee of the vendor.

The trial court sustained this defense, and on appeal to the Court of Appeals its judgment was affirmed.

Ruling—Section 2448 of the Revised Statutes declares that the Police Juries of the several parishes and the constituted authorities of incorporated towns and cities in the State shall not have power to contract any debt or pecuniary liability without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt so contracted.

This is a prohibitory law, and such a limitation upon the *power* of Police Juries and municipal authorities that it is operative as well against third persons holding the evidences of the debt contracted as against the original holders themselves.

Repeated decisions have placed it beyond controversy that debts contracted in violation of this statute are stricken with nullity and incapable of judicial enforcement. *Oubre vs. Town of Donaldsonville*, 33 La. Ann. 387.

Rush et al. vs. Landers.

The purchase of the engines in question was not an ordinary, current, administrative expense of the town of Jennings payable out of the annual appropriation of current revenues, as was the debt sued for and held collectible in *Laycock vs. City of Baton Rouge*, 35 La. Ann. 479.

There was no estimate of receipts and expenditures which included the purchase of the engines, nor any allotment of a portion of the revenues of the year of the contract, or of future years, to the payment of their price, as was the case with respect to the debt sued for and held collectible in *Railway Co. vs. Police Jury*, 48 La. Ann. 331.

Here, the ordinance of the town contracted a debt and provided the funds to pay a small part of it, to-wit:—\$200.00, but made no provision whatever for the remainder and larger part, to-wit:—\$1500.00, with 7 per cent. interest per annum.

In this there was a palpable violation of the section of the Revised Statutes referred to, and this suit to enforce the terms of the contract, whether it be held to be an action on the note itself, or on the resolutions of the Town Council authorizing the purchase of the engines and accepting them after test, cannot be sustained.

It is, therefore, ordered that the judgment of the District Court, affirmed by the Court of Appeals, rejecting plaintiffs demand and decreeing the return of the engines to the plaintiff, do stand as the judicial determination of the issue herein involved.

No. 14,003.

FRED. B. RUSH ET AL. VS. FRANKLIN LANDERS; MARTHA E. LANDERS,
INTERVENOR.

SYLLABUS.

1. Where immovable property in this State purports to have been sold by a husband to his wife for a certain sum of money, the title is invalid on its face, the apparent consideration not being within the exceptions provided by C. C. 2446 as essential to the validity of a sale in such case, and the property is liable to seizure by the creditors of the husband.
2. Where property so situated is seized upon a claim against the husband, and the wife intervenes, setting up title, and the seizing creditor propounds to her interrogatories on facts and articles, her answers thereto are entitled to no greater effect, as against such creditor, than her testimony, or that of any other witness, given orally.

107	549
109	682
107	549
112	913
107	549
120	425

 Kush et al. vs. Landers.

3. Where the seizing creditor, in propounding such interrogatories, takes the initiative and attempts to show that the consideration of the putative sale was other than as stated, either in the intervenor's title or in her intervention, and, thereafter, fails, in this court, to ask for any ruling upon his objection, made during the trial, to the introduction of parol evidence to show the real consideration of such sale, it will be presumed that the objection is abandoned.
4. Where the answers to such interrogatories show that property in another State had been conveyed by the husband to the wife for a particular consideration, arising under the laws of that State, this court will not assume, even though it should be made to appear that such consideration was inadequate, that a different consideration, testified to as moving in the matter of the conveyance of the Louisiana property, was, therefore, included and exhausted for the purposes of the conveyance in such other State.
5. The validity of the conveyance of immovable property in Louisiana, and the capacity of a husband and wife to deal with each other with respect thereto is to be determined by the law of Louisiana.
6. A sale of such property, between husband and wife, can be made only in the cases, and for the consideration, as provided in C. C. 2446, and if, apparently, made for some other consideration, is invalid on its face, and if, acknowledged, by a party showing sufficient interest, the burden of proof, if proof be admitted, rests upon the party seeking to maintain the validity of such sale to show that the real consideration was within the exceptions provided in said article.
7. If, in such case, the claim be that the consideration was an indebtedness of the husband to the wife, for money said to have belonged to the wife and to have been received and used by the husband, it must be shown, where the parties are domiciled in another State, that, by reason of such receipt and use, the husband became the debtor of the wife, that the debt existed at the time of the conveyance, and that the property was conveyed in satisfaction, or in part satisfaction, of such debt.
8. Whether, in such case, the husband becomes the debtor of his wife depends upon the law of their domicile.
9. The courts of Louisiana will take judicial cognizance of the prevalence of the Common Law in a sister State and of the rule of the Common Law, that a married woman cannot possess personal property independently of her husband, except where a trust has been created for her separate benefit. But statutory modifications of the Common Law, or the creation of such trust, must be proved, if either be relied on.

A PPEAL from the seventeenth judicial district, parish of Vermillion.—*Gordy, Jr., J.*

Wilson & Townley (W. B. White and W. W. Edwards, of counsel),
for plaintiffs, appellants.

Walter Augustus White, for intervenor, appellee.

The opinion of the court was delivered by

MONROE, J. Fred. P. Rush and George E. Townley, residents of Indiana, and original plaintiffs herein, in February, 1900, obtained

judgment in the circuit court of Marion county, Indiana, against the defendant, Franklin Landers, also a resident of that state, in the sum of \$4745.58, representing the principal and interest of a debt said to have been contracted in 1895, upon which judgment, in March, 1900, they instituted suit, in the district court for the parish of Vermilion, and caused to be seized, by attachment, a rice farm lying in that parish, which, they alleged, belonged to the defendant. The defendant, appearing through the *curator ad hoc* appointed by the court to represent him, answered, disclaiming title. Thereupon, Martha E. Landers, his wife, intervened, claiming to be the owner of the seized property by virtue of a conveyance made by her husband, in January, 1894, in part satisfaction of an alleged debt, for a larger amount, said to be due for separate funds belonging to her which had been delivered to, and used by, him, and praying that her title be recognized and the attachment dissolved. About the time that this intervention was filed, George E. Townley died and Morris M. Townley, his administrator, was made party plaintiff in his stead, and he and Rush answered the intervention, in effect, as follows, to-wit: that the property seized belonged to the community between Landers and his wife, and that the transfer of title to the wife, as set up by the intervenor, was null and void, because not within any exception to the prohibition contained in the law of this state against sales between husband and wife; because the property was worth \$10,000.00, whereas the cash consideration of the alleged conveyance purports to have been \$2000.00, and for the balance the wife undertook to bind herself with respect to certain mortgages bearing upon the property in the name of her husband; or, if it be held that she did not so undertake, then, that the price is "vile"; and that the debt claimed by plaintiffs is a debt of the community, for which said property remains liable. The answer concludes with a prayer that interrogatories on facts and articles be propounded to the intervenor, and for judgment, etc.

Interrogatories were accordingly propounded to, and answered by, the intervenor, under a commission executed at her residence, in Indiana, and the commission was duly returned, and made part of the record. The intervenor was, also, sworn as a witness in her own behalf, and testified orally; other evidence was adduced, and the case was argued and submitted, and decided in favor of the intervenor on the question of title, and in favor of the defendant by judgment of nonsuit. And, from the judgment so rendered, the plaintiffs prosecute this appeal. In the course of the execution of the commission under which the intervenor answered the interrogatories on facts and articles, the

point was reserved on behalf of the plaintiff that the answers were read from a paper which had been prepared in advance, and that the intervenor declined to answer in any other way and declined to state by whom the paper had been prepared. The point thus reserved was not, however, insisted upon in the district court, and has not been referred to by counsel for plaintiffs, who rely, in their argument before this court, upon their ability to show that the answers given by the intervenor to the interrogatories, and in her oral testimony, are self-destructive, and are overborne by other testimony. We take it, therefore, that the answers to the interrogatories on facts and articles are to be accepted subject to the conditions last mentioned, since they can hardly be used for the purposes of an attack upon the oral testimony given by the intervenor if they are to be excluded from the record. As to the effect of those answers, counsel for the intervenor contends that it can be destroyed only by the testimony of two witnesses, or of one witness and strong corroborating circumstances, which, he claims, have not been produced, whilst counsel for plaintiffs insist that such effect should be determined, in this case, by the rules applicable to ordinary testimony, for the reasons; (1), that the law governing the answers of the defendant in a case is inapplicable where interrogatories "are answered by one who, as intervenor, has the burden of proof"; (2), that certain of the answers of the intervenor, as to the value of the real estate in Indiana transferred to her by her husband, are merely expressions of opinion upon matters concerning which it does not appear that she was qualified to judge; and they further insist that, as to certain mortgages, which are said to have borne upon the Indiana property at the time of its transfer, the answers are contradicted by official certificates from the mortgage records; and, finally, that they are overborne, throughout, either by the testimony of two witnesses, or its equivalent.

The Code of Practice provides that "both plaintiff and defendant" may propound interrogatories on facts and articles (Art. 347), and the answers are given the same effect whether made by the one or the other, and irrespective of the burden of proof. The plaintiffs correctly assumed that, as they occupied the position of defendants, *quoad* the claim set up by the intervenor, they were entitled to propound such interrogatories to her, and, if this be true, there can be no reason why her answers should not be given the effect that would be accorded to those of a person occupying the position of plaintiff *eo nomine*. Prior to 1870, Article 354 of the Code of Practice read as follows: "The answers of the party "interrogated are evidence, but do not

exclude adverse testimony, and may be destroyed by the oath of two witnesses, or of one single witness corroborated by strong circumstantial evidence, or by written proof." (Fuqua C. P. Art. 354.) And the case of *Hynson vs. Texada*, 19 Ann. 470, to which we are referred, was decided under the law as thus expressed. The present article 354 reads: "The answers of the party interrogated are evidence, but do not exclude adverse testimony, and shall be weighed by the judge as other testimony." And, for general purposes, to which the article applies, there can be no doubt that the answers referred to are to be dealt with as therein provided.

It is true that, under the Code of Practice as now written, it is well settled, as it was well settled before the amendment, that, as between the parties to a sale of real estate, there are but two ways of impeaching the title, which is required to be in writing, the one, by means of a counter letter, and the other, by interrogatories on facts and articles, and that, when answers to such interrogatories are substituted for the counter letter the title thus established can no more be impeached by parol testimony than if established in any other written form. *Semere vs. Semere*, 10 Ann. 704; *Godwin vs. Newstadt*, 42 Ann. 735. This rule of exclusion applies, however, only to the parties to the instrument attacked and does not apply to third persons. *Benoit vs. Broussard*, 19 La. 387; *Blake vs. Hall*, 19 Ann. 52; *Finley vs. Bogan et als.*, 20 Ann. 444; *Carey vs. Richardson*, 35 Ann. 505. We conclude, therefore, that, for the purpose of this case, the answers of the intervenor to the interrogatories on facts and articles are entitled to no greater effect than her oral testimony, given in her own behalf.

Counsel for plaintiffs also objected, in the course of the trial, to the proof of any other consideration for the conveyance to the intervenor of the property in controversy than that evidenced by the written instrument, and the objection was overruled. But, as the counsel themselves, appear to have opened the door to such proof by their interrogatories on facts and articles, and as they do not refer to the matter in their argument before this court, we assume that the objection in question, like the other, has been abandoned, and, for this reason, we make no ruling concerning it.

Proceeding upon the basis thus established, it appears that, in January, 1894, Franklin Landers, the husband of the intervenor, conveyed to his wife a number of pieces of real estate, in Indiana, consisting of farms, town lots, etc., concerning which it is claimed, on behalf of plaintiffs, that the aggregate value was \$158,051.00 and that the mortgages with which they were burdened amounted to \$86,865.00,

leaving a margin of value, carried by the conveyance to his wife of \$71,186.00; whilst the intervenor claims that the property was worth \$119,080.00, and that the mortgages equalled, or exceeded, its value. And the defendant, also, upon January 22, 1894, conveyed to his wife the farm seized in this case, which is said to be worth \$10,000.00, and which was then burdened with mortgages amounting to \$7500.00, exclusive of interest, etc. These different conveyances, evidenced by written instruments, duly recorded, purport to have been sales for money in hand paid. But the interrogatories on facts and articles were propounded by the plaintiffs for the purpose of enabling them to show that the consideration for the conveyance of the Indiana property was something other than cash, and that it must have included, and have extinguished, the alleged debt, of any such debt existed, in part payment of which the intervenor alleges that the Louisiana farm was conveyed to her. In her answers to those interrogatories, however, and also in her oral examination, the intervenor states that the Indiana property was conveyed to her in fulfillment of the verbal promise of her husband that he would, in that way, make good an interest in that, and other, property, which interest, secured to her by the law of Indiana, she had parted with at his request and in order to facilitate him in paying his debts. And, in her oral testimony, she also states that the Louisiana farm was so conveyed in part satisfaction of her claim against her husband, represented by his note of \$10,324.87, for personal funds, belonging to her, which had been delivered to, and used by, him, together with accumulations of interest.

As to the consideration for the conveyance of the Indiana property, it appears, that, by the law of Indiana, which plaintiffs have proved, tenancies by curtesy, and in dower, have been abolished, and a married woman is given one inchoate one-third, one-fourth, or one-fifth interest, varying, *quoad* the debts of her husband, with the value of the property, in all real estate acquired by her husband during the marriage, or in which he may have an equitable interest at the moment of his death, which inchoate interest becomes absolute upon the death of the husband, or upon the forced alienation of the property during his life, unless the wife has previously joined him in such alienation, or in imposing incumbrances importing the right to alienate; *provided*, that the wife may elect to take under the will of her husband, if there be one; and *provided*, also, that in case of judicial sales of such real estate where the value exceeds \$20,000.00 her interest becomes absolute only up to that value (Revised Statutes of Indiana, sections 2482, 2483, 2491, 2499, 2508, 2509.)

As to the consideration for the conveyance of the Louisiana property, it is shown that the intervenor was first married to Washington Conduitt, who died in 1862 leaving her \$4000.00 by his will, together with \$1400.00, which he had given her shortly before his death; that, in 1865, the \$5400.00 thus received had increased to \$7200.00, and that she, then, married Franklin Landers, to whom at one time or another, she turned over the whole of that amount, taking his notes therefor; that, by reason of the accumulation of the interest allowed by Landers, the \$7200.00 had increased, by January, 1883, to \$10,324.87; that he then substituted a note for that amount in place of the notes previously given; and that, whilst interest had been paid on said note, from time to time, little or nothing had been paid in reduction of the principal amount up to the date of the conveyance of said Louisiana property, and that said property was conveyed to her in part satisfaction, that is to say, up to the sum of \$2000.00, of the claim represented by said note.

It is admitted, by the argument, that the intervenor had a valuable interest, under the law of Indiana, as above recited, and it is not denied that she parted with it in joining her husband in mortgaging or selling the property to which it attached. Nor is it denied that it was competent, under the law of Indiana, for the husband to make that interest good, by the conveyance to the wife of real estate there situated. It is also, virtually, admitted that this court will be justified, from the evidence in the record, in holding that the intervenor had placed in the hands of her present husband \$5400.00, with the accretion thereto, which she had received from her first husband and his estate, and that the same had not been returned to her, or otherwise accounted for, prior to the month of January, 1894. And, from these premises, counsel for the plaintiffs present an argument involving several propositions of law which may be conceded with certain modifications not material to the plaintiffs' case. Thus, it is conceded that the validity of a conveyance of real estate lying in Louisiana is to be determined by the law of Louisiana, and that the capacity of persons occupying the relation of husband and wife to deal with each other with respect thereto is to be determined by the same law. It is also conceded that, under the law of Louisiana, a sale between husband and wife can take place only for the considerations stated in the law itself; that, where such sale purports to have been made for some other consideration it is invalid, upon its face, and, if attacked, by a party having sufficient interest, the burden of proof, whenever such proof is admissible, rests upon the party seeking to maintain its validity to show that the real

consideration was within the exceptions provided by law; and if the claim be that the real consideration was indebtedness by the husband to the wife on account of money said to have belonged to the wife and to have been received and used by the husband, it must be shown, where the parties reside in another state, that, by reason of such receipt and conversion, the husband became the debtor of the wife, that the debt existed at the time of the conveyance of the property, and that such conveyance was made in satisfaction, or part satisfaction, thereof. It is further conceded that the intervenor and her husband, having been residents of Indiana, the question as to whether the husband became indebted to his wife, by reason of his receipt and conversion of money, said to have belonged to her prior to his conveyance to her of the real estate in Louisiana, must be determined by the law of Indiana.

The learned counsel then proceed as follows:

1. It having been shown that the common law has been adopted in Indiana, and it not having been shown that it has, in that respect, been modified by statute, this court will assume, agreeably to the common law rule, that the husband of the intervenor owed her nothing on account of any money belonging, or said to have belonged, to her, which may have been received and converted by him, and hence, that there was no consideration, which the law of Louisiana will recognize, to validate the conveyance of the property here situated.

2. If the position, as thus stated, be not sustained, then, that the verbal promise of the husband, to make good, by conveyance of real estate in Indiana, the interest of which the intervenor had divested herself for his accommodation, was not enforceable, in view of the provisions of the Indiana Statute of Frauds (which the counsel have offered in evidence) on the subject of verbal contracts relating to real estate. And;

3. That the net value, after deducting the mortgage debt, of the Indiana property conveyed to the intervenor exceeded the value of the interest which she claims it was intended to make good, and hence, that it should be held that such conveyances also operated to extinguish the claim for money received and converted.

The propositions 2 and 3 will first be considered in their order as stated above. In support of proposition 2, we are referred to the case of *Worth vs. Patton*, 5 Ind. App. 272, in which it appeared that the husband desired to convey certain lands to the children of a former wife and that he, verbally, promised the wife that, if she would join him in such conveyance, thus releasing her inchoate interest, he would convey to her certain other real estate, which promise was accepted and

acted on by the wife, but that the husband died without fulfillment on his part. It further appeared that the widow then made a claim against the estate of the deceased asking to be made good with respect to the interest with which she had thus parted, which claim was resisted on the ground that the promise was void under the statute of frauds. It was held by the court that, if the action had been brought for specific performance, or for damages for breach of contract, the defense might have prevailed, but that the widow was entitled to recover the fair value of the interest with which she had parted upon the faith of a promise which had not been fulfilled and which could not be enforced. This decision appears to us to be equally sound in law and in morals, but we are unable to perceive in what way it supports the proposition of the learned counsel. It was not held that the husband could not, under the statute of frauds, have complied with his promise, nor was it held that, if he had complied with it, a creditor to whom he contracted a debt eighteen months later could have successfully attacked the conveyance, upon the ground that the consideration was inadequate.

Proposition No. 3 appears to us to involve a *non sequitur*, since, assuming that the net value of the Indiana property conveyed to the intervenor exceeded that of the interest which she claims it was intended to make good, it would not follow that the parties intended the excess in value to be attributed to the extinguishment of the claim for personal funds had and converted by the husband. There are other hypotheses to be taken into account. Landers may have intended to convey the property to his wife for an inadequate consideration, or he may have believed, the opinions of the witnesses who have been examined in this case, or the fact, if it be a fact, or both the opinions and the fact, to the contrary notwithstanding, that the property was not worth more than the claim in satisfaction of which it was transferred. There is nothing to indicate that any creditor was left unsatisfied at the time that the conveyances in question were made, and those conveyances certainly inflicted no injury on plaintiffs, whose debt had not then been contracted, and was not contracted until a year or more later. But, if the purpose had been to place the property of the husband, both in Indiana and Louisiana, beyond the reach of the husband's future creditors, it is not apparent why the claim of the wife for the restitution of her personal funds, which claim, there were reason to believe might serve as a valid consideration for the conveyance to her of the Louisiana property, should have been exhausted in Indiana, when, as we infer from the fact that plaintiffs appear to have made no attack on

them, the consideration for the conveyances in Indiana, as stated by the intervenor, was sufficient to enable her to hold the property there conveyed.

Passing to some other questions: There is no doubt that the Louisiana farm, having been acquired during the marriage, was community property, though Landers and his wife resided in Indiana. C. C. 2400. But that did not prevent its conveyance to the wife, provided there was a consideration, which, under the law of Louisiana, would be sufficient to support a sale, or *dation en paiement*, from husband to wife. The position taken in the answer to the intervention, that the intervenor, as part of the price, assumed the mortgage debts resting upon the property, and due by the husband, is not sustained by the fact. The intervenor did not assume the mortgage debts, but, took the property, *subject* to the mortgages, and only for its supposed value over and above the debts thus secured. So, also, with regard to the position that property worth \$10,000 was conveyed to her in extinguishment of her claim to the extent of only \$2000, and that the price was "vile," etc. Such was not the fact. The property was conveyed subject to mortgages amounting to \$7500, exclusive of costs, interest, attorney's fees, etc., for which it may be liable, and hence, the interest acquired by the intervenor seems to bear but a just proportion to the claim for which it is said to have been given in satisfaction.

Mrs. L. C. Colvin vs. D. A. Johnson, Sheriff, *et als.*, 104 La. 655.

The question which remains is: Was there a consideration for the conveyance of the Louisiana property from husband to wife, such as can be recognized under Louisiana law? The conveyance purports to be a *sale* for \$2000, and is invalid upon its face.

"A contract of sale between husband and wife can take place only in the three following cases:

"1. When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.

"2. When the transfer made by the husband or his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.

"3. When the wife makes a transfer to the husband of property, in payment of a sum promised him as dowry. * * *" C. C. 2446.

The burden of proof is on the intervenor to show that the conveyance, which appears upon its face to be invalid, because the consideration expressed is not within the exceptions of the law, is based upon another and a different consideration, which is within those exceptions.

She has undertaken to accomplish this by showing that she turned over to her husband certain funds, which, in this state, would be considered paraphernal, and that the property in question was conveyed to her, by her husband, in part satisfaction of the debt which he incurred in receiving and using said funds. But she has not shown that her husband thereby incurred any debt, for that is a matter which is to be determined by the law of their domicile, where the funds were received and converted. The plaintiffs have proved the adoption of the common law by the state of Indiana, a fact of which we might have taken judicial notice, as we now take judicial notice of what the common law is, though we do not take such cognizance of the statutory modifications of that law. Copley vs. Sanford's Extr., 2 Ann. 335; Kling vs. Sejour, 4 Ann. 130; Ripka vs. Pope, 5 Ann. 63; Gates vs. Gaither *et als.*, 46 Ann. 292; Lambert vs. Ins. Co., 50 Ann. 1031; Roehl vs. Porteous, 47 Ann. 1582; 13 Am. & Eng. Ency. of Law (2nd Ed.), 1058.

At common law, a married woman cannot possess personal property independently of her husband except where a trust is created for her separate benefit; and the promise of the husband to repay money received from the wife during coverture, would be without consideration. 15 Am. & Eng. Ency. of Law (2nd Ed.), 820; Henderson vs. Trousdale, 10 Ann. 548; McCall vs. White, *Ib.* 577; Eager vs. Brown, 14 Ann. 594; Quigley vs. Muse, 15 Ann. 197. There is no evidence in the record that this rule has been modified by statute in Indiana, and, hence, we have no basis upon which to hold that the receipt of money from his wife and its conversion by Landers imposed any obligation upon him the discharge of which could serve as the consideration for the conveyance to her of property in this state. Even if it had been shown that by reason of statutory modification in Indiana of the common law otherwise prevailing there, Landers became the debtor of his wife with respect to her personal funds received and converted by him, and that he also owed interest thereon, under an agreement to that effect, such obligation would not be held, in this state, to stand upon the same footing as the debt of a citizen of Louisiana to his resident wife for paraphernal or dotal funds received by him. Nor, would a conveyance of property, made in this state, in satisfaction of the one debt, be here given the effect which, under our law, is accorded to the *dation en paiement* in satisfaction of the other. Prats vs. Creditors, 2 R. 501; Stewart vs Creditors, 12 Ann. 89; Hyman, Lichtenstein & Co. vs. Schlenker & Hirsch, 44 Ann. 118. The counsel for the intervenor contends, however, that a creditor can proceed by the seizure of property, the title to which is in another person than his debtor, only

where such title is a pure simulation. Correctly stated, we take the rule upon this subject to be that, "when immovable property has been sold by authentic act, *valid on its face* and accompanied by actual delivery, and continuous possession and control by the vendee, as owner, a creditor of the vendor cannot seize the property in disregard of the transfer; and, when enjoined by the vendee, such seizing creditor will not be allowed to allege and prove that the sale is a fraudulent simulation * * *. The title of the vendor under such circumstances can only be attacked in a direct action in avoidance of the sale. And, in such direct action, whether revocatory or *en declaration de simulation*, the plaintiff must aver and prove that the act sought to be avoided operated injuriously to him. Willis vs. Scott, Sheriff, 33 Ann. 1026; Cochran vs. Gibert *et als.*, 41 Ann. 735; Thompson & Co. vs. Hering, 45 Ann. 991.

In the case last above cited, the syllabus reads, in part: "If the act of sale evidenced a real transaction, whatever its character, the administratrix could not ignore it, or attack it collaterally, but could only claim its judicial revocation by direct action."

But, in the case at bar, the putative sale, from husband to wife, purporting to have been made for money in hand paid, is not valid upon its face—but is distinctly invalid, as being, apparently, in violation of a prohibitory law. It cannot, therefore, be said to evidence a real transaction, but leaves the title to the property, apparently, in the vendor, and subject to seizure at the suit of his creditor.

Our learned brother of the District Court, after a conscientious and exhaustive review of the case, concludes his opinion as follows: "* * * it seems, so far as I am advised, that, under the law of Indiana, the husband and wife have almost unlimited power to contract with each other. Under our own law, restitution to the wife, by the husband, is looked upon with favor. * * * The sale in controversy in this case was an accomplished fact long before the plaintiffs ever became creditors of the defendant, Landers, and the intervenor, by virtue of that sale, had accepted that property and gone into actual possession of the same. For the foregoing reasons, and after a prolonged and thorough study of the question, and all the law and facts bearing upon it, I am forced to conclude that the transaction, or transfer, in controversy, vested title to the property in the intervenor, and she is accordingly declared to be the true and lawful owner," etc.

We infer from this that something may have been conceded, in the argument in the district court, as to the statutory modifications of the common law, in Indiana, in so far as that law bears upon the relation

 Succession of Miller.

of husband and wife, but we have been unable to find in the record any proof of a modification whereby the husband becomes the debtor of the wife by reason of his receipt and conversion of her personal funds. Our conclusion, therefore, upon the case presented is, that the intervenor has failed to make the proof necessary to establish her claim, and that her intervention should be dismissed as in case of non-suit.

Since the submission of the case, the death of Franklin Landers has been suggested, and his legal representatives have been made parties hereto.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the plaintiffs, Fred. P. Rush and Morris M. Townley, administrator of George E. Townley, deceased, and against the intervenor, Mrs. Martha E. Landers, dismissing the intervention of said Mrs. Landers as in case of non-suit and at her cost in both courts.

Rehearing refused.

No. 13,993.

SUCCESSION OF LOUISA MILLER, WIFE OF CHRISTIAN W. POHLMAN.

SYLLABUS.

In the publication of the ten days' notice of the filing of the tableau of the administrator of a succession, neither the first nor the last day of the publication can count; and this notice being essential, a judgment of homologation of such an account entered up on the twelfth of the month, where the first publication was on the second of the month, will be set aside.

A PPEAL from the Civil District Court, Parish of Orleans—*Ellis*,
J

Dart & Kernan, for Plaintiff, Appellee.

William S. Benedict and *O. H. Simpson*, for Defendant, Appellant.

The opinion of the court was delivered by

PROVOSTY, J. The law provides that before the account of the administrator of a succession can be homologated, ten days' notice of its filing must be given. C. C. 1064. And in the parish of Orleans this notice must be given by publication in two newspapers, published one in the

English and the other in the French language. Act 125 of 1888, p. 186; Davidson vs. Houston, 35 Ann. 942. As the notice is in the nature of a citation, the doctrine of the case of Catherwood vs. Sheperd, 30 Ann. 677, applies, and neither the first nor the last of the ten days can count. The notice of the filing of the account in this case was published the first time on the 1st of April in the English language and on the 2nd of April in the French language, and the account was homologated on the 12th. The homologation was therefore one day too soon. This is fatal to the judgment of homologation. Taylor vs. Jeffries, 1st Rob. 1.

It is therefore ordered, adjudged and decreed that the judgment appealed from be set aside and annulled, and that this case be remanded for further proceedings.

No. 14,047.

STATE OF LOUISIANA VS. NEW ORLEANS DEBENTURE REDEMPTION
COMPANY, LIMITED.

SYLLABUS.

1. Where an association is carrying on business claiming corporate capacity and corporate protection, the State has the right, by judicial action, to test its claims, both as to its organization and as to the business it is conducting, being such as falls within the permissive terms of statutes authorizing the creation of corporations.
2. It has the right to hold matters in abeyance by injunction, for the protection of all parties in interest, until the termination of such a suit. Its duty ends when it has caused to be set aside the association's claim to corporate capacity and protection. It is not charged with the duty of protecting the rights of parties placed in position to protect themselves.
3. The mere fact that the affairs of such an association have been prematurely or irregularly settled by those having actual control of its assets, furnishes no ground for the appointment of a receiver at the instance of the State itself, when all debts have been paid and all parties in interest are satisfied and the business in the State has ended. The State is no longer concerned in the matter.

A PPEAL from the Civil District Court, Parish of Orleans—*St. Paul, J.*

Walter Guion, Attorney General (*Milton Joseph Cunningham* and *Frank E. Rainold*, of Counsel), for Plaintiff, Appellee.

Pierson & Pierson and *Walter H. Rogers*, for Defendant, Appellant.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

NICHOLLS, C. J. The judgment of the District Court was in favor of the plaintiff, the State of Louisiana, and against the defendant decreeing "the pretended charter under color of which the defendant claims corporate existence to be null, void and of no effect, and that the president, secretary and general manager and the officers, agents, directors and members of said so-called corporation are and have ever been without legal authority to act in a corporate capacity in the name of the New Orleans Debenture Redemption Company of Louisiana, Limited, and under color of its pretended charter. It further ordered that the injunction heretofore issued prohibiting and restraining said company, its officers, directors, agents and representatives from removing the assets and funds of said company from this State or beyond the jurisdiction of this court, from receiving any money or instalments from its debenture holders, from paying out any money on surrender or withdrawals, or on redemption of debentures, from making loans on and from forfeiting any of said debentures, or the rights of any of the holders thereof, be now confirmed and made absolute. And it is further ordered and adjudged that said company, so-called, its officers, agents and representatives and members be further perpetually enjoined and restrained from acting in a corporate capacity."

After this judgment was rendered on motion of the Attorney General, the District Court recognized the appointment and commission of the Governor issued to August M. Benedict, and ordered that a commission issue to him as liquidator. These judgments were appealed to the Supreme Court. The Supreme Court affirmed the first judgment, but annulled the order issued by the court recognizing Benedict as liquidator, and left at large the question of the appointment of a receiver. On rehearing this court said:

"The whole question as to the appointment of liquidator or receiver was left at large, and to be considered as an original question whether the appointment of liquidators or receivers lies with the Governor or of receiver with the court or the parties in interest we do not determine. It is left an open question."

In April, 1901, the State, through the Attorney General, filed a petition in the District Court in which, after referring to the fact that the order recognizing Benedict, liquidator, had been vacated and to the

decree of the Supreme Court on that subject it alleged that the cause was remanded for further proceedings with the express reservation to the State of Louisiana and all other parties in interest of all rights under the law relative to the appointment of a receiver or liquidator. That since the rendition of the judgments in the case the Legislature had passed Act No. 26 of 1900 giving the court the right and power, on application of any party in interest or on application of the Attorney General, to appoint a receiver to take charge of the property and effects of any corporation which has ceased to exist or whose charter has been repealed without providing for the liquidation of its affairs. That, therefore, the appointment of Benedict by the Governor as liquidator should be confirmed, but that if it should be held that Act No. 26 of 1900 is applicable to this cause and has repealed Section 731 of the Revised Statutes, then a receiver should be appointed to take charge of and liquidate the affairs of the defendant company.

The prayer of the petition was that Benedict be recognized as the liquidator of the New Orleans Debenture Company of Louisiana, Limited, under the appointment of the Governor; that he be directed to take charge of the affairs of the defendant company and to liquidate them and in the alternative should it be held that Act No. 26 of 1900, or any other law, has repealed Section 731 of the Revised Statutes, a receiver be appointed with such powers as may be necessary and proper; that an inventory be made of all the property and effects belonging to the defendant company, and that the officers of said defunct corporation be directed to turn same over to the liquidator or receiver and to likewise turn over to either of them the books, documents, papers, etc., of said defunct corporation or company that the entire question of the liquidation of the defendants' affairs be considered and determined; that all the intervenors as well as the defendant be ordered to show cause why the prayer of the petition should not be granted and for such other and general relief as the nature of the cause may demand.

This petition was ordered to be filed and notice entered in the Receivership Order Book of the court and the defendants were ordered to show cause why the prayer of the petition should not be granted. The petition and order were ordered to be served upon J. F. Pierson, attorney of record, of all the intervenors.

The New Orleans Debenture Redemption Company of Louisiana,

Limited, filed an answer through Pierson & Pierson signing as attorneys for defendant. It excepted.

1st. That the defendant company was an unincorporated association without the capacity or authority to appear or defend in the rule.

2nd. That the necessary and proper parties had not been joined or notified or made parties to defend the rule. That all the individuals, parties to the record, who were before the Supreme Court, whose rights were there reserved, and with whom contradictorily to be tried, this issue was remanded, should be notified and joined as defendants in the rule.

3rd. That same are the real parties in interest and judgment could not properly be rendered without notifying and making them parties.

Should these exceptions be overruled, defendants further excepted.

4th. That the State exhibited no interest in herself to these proceedings.

5th. That Section 731 of the Revised Statutes had been repealed by the Constitution of 1898—Articles 16, 17 and 133, and by Act No. 159 of 1898, and the rule taken was not authorized by any law of the State.

6th. That the appointment as liquidator, made by the Governor on March 6th, 1899, had been annulled and set aside by the Supreme Court on appeal and could not be recognized or confirmed by the court.

7th. That said appointment was made by the Governor in violation of the Articles stated by the Constitution, and there was no law authorizing the Governor to appoint a liquidator or receiver in this case.

Under reservation and benefit of these exceptions, defendant answered, pleading, first, the general issue, and further answering it averred that all of its affairs and liabilities had been settled at least as far as it was practicable to do and as far as any liquidator or receiver could do, and there was practically nothing that a liquidator or receiver, if appointed, could do in this case and no legal reason or necessity existed for the appointment of such. That full and adequate provision for the full liquidation and settlement of all the affairs and liabilities of the association had long since been made by the mutual consent and joint action of all the parties in interest and same had been carried into effect and full adjustments and settlements of all its

liabilities and affairs had been made mutually between all the persons and parties in interest except a small and insignificant amount of liabilities in favor of a few parties whose whereabouts, after due and continued advertisement in the daily newspapers of this city, could not be ascertained. That such liabilities did not amount to more than three or four hundred dollars, as to which due and adequate provision had been made for the payment on presentation and as soon as said parties could be located said liabilities would be settled, and the defendant association was ready and willing to enter into and give any necessary bonds and securities which the court might require for the prompt settlement and payment of all said outstanding liabilities on presentation thereof to H. B. Bayne of New Orleans, or other suitable person to be designated by the lawful owners and holders thereof.

That a liquidator or receiver, if appointed, could do no more than had already been done in the liquidation or settlement of said affairs and liabilities, and the appointment by the court at that time of a receiver was not authorized or warranted by law and could only result in the accumulation of unnecessary and useless court costs and attorneys fees. In the event, however, the court should hold that the appointment of a liquidator was necessary or proper (which was denied), then and in that event only it averred that H. B. Bayne was the most competent and fit person to be appointed. That he was in every way more familiar with the affairs of the association than any other person, and was in every way a competent and suitable person to be appointed receiver.

The defendant prayed that the demand of the plaintiff in rule be rejected and the rule be dismissed, but, contingently, that Bayne be appointed receiver.

W. H. Rogers, who was president of the defendant corporation at the time of the institution of the suit against it by the State, and at the time of the final judgment in the cause, first excepted and under reservation of the same answered. The exceptions were substantially those already referred to. The answer consisted of a general denial, followed by special allegations, contesting the right and necessity of appointing a receiver. He averred that, by final judgment, the defendant corporation had been perpetually enjoined from acting as a corporation; that all its corporate franchises at any time exercised by it had been annulled and set aside and in all respects defendant had acquiesced in the judgment. That the corporation was not and never had been in-

solvent, but was able and prepared to respond to any claim or charge that might be legally presented. That it was not without personal representation in New Orleans and in the State, and either through the president or stockholders residing in New Orleans might at any time and all times be reached. That all its obligations were represented in written contracts and obligations, and beyond said written contracts and obligations it had and could have no outstanding claims against it; that as it was its right and was its duty to do it had without charge or expense to those having claims against it liquidated and discharged its said indebtedness. That as expeditiously as possible it was liquidating and retiring its outstanding claims. That it appeared from an account and affidavit of J. P. Williams, secretary and treasurer of the defendant company, which he annexed of date April 1st, 1901, there were forty-six debentures upon which there were dues to the sum total of \$1042, and since that date, as appeared from the affidavit of the president, \$538.59 had been paid, thus leaving at the date of the answer debentures representing a total of \$503.58, which amount defendant holds, payable on presentation. That all the acts of the defendant in the premises were in strict accordance with its rights and in addition thereto they were urged and granted by ninety per cent. of those who held and owned the said obligations.

A supplemental answer and exceptions were filed by the defendants to the effect that the New Orleans Debenture Redemption Company, Limited, was never a corporation authorized under the laws of Louisiana, nor one organized according to law in the State and the State was barred and estopped from asserting or contending judicially or otherwise that the same was, or ever had been, a corporation by the judgment of the District Court rendered at the instance and procurement of the State, and which judgment was affirmed by the Supreme Court decreeing that association was not authorized by law or organized according to law, which judgment formed *res judicata* and estopped the State from pleading or asserting to the contrary. They excepted *de novo* that the State was without interest in the subject matter involved in the rule or authorized by any law to take the action it did; also they denied that any law of the State authorized or warranted the appointment of a receiver or liquidator in the cause under the rule filed or the allegation or facts declared therein.

The District Court rendered judgment making absolute the rule taken by the State and appointed William C. Dufour receiver of the

New Orleans DeBenture Redemption Company of Louisiana, Limited, and defendants appealed.

Section 731 of the Revised Statutes of 1870 declares that whenever the charter of any corporation in this State shall be declared forfeited by any competent court, the District Attorney of the district shall forthwith inform the Governor of the fact, who shall thereupon appoint a liquidator to take charge of and liquidate the affairs of the corporation as in case of insolvencies or individuals.

In 1899 the General Assembly passed Act No. 159 of that session entitled "An Act to authorize and regulate the practice of appointing receivers of corporations under Article 109 and 133 of the Constitution."

The Act is composed of eleven sections. The first section declares that the several District Courts of the State are empowered to appoint receivers to take charge of the property and business of corporations domiciled in and of the property of foreign corporations actually located therein, enumerating in eleven clauses the conditions under which the power can be exercised. In none of these cases does the court act of its own motion. In all of these cases judicial action is predicated upon application made to it either by one or more creditors or one or more stockholders and the State is nowhere mentioned.

In 1900 the General Assembly enacted Act No. 26 of the session of that year an "Act to authorize the *appointment of receivers in all cases of defunct corporations.*" It provides that in all cases where any corporation, possessed of property, rights or credits, has ceased to exist or its charter has been repealed without providing for the liquidation of its affairs, the District Court having jurisdiction of the place where said corporation was in existence, shall have the right and power, on the application of any party in interest, and where no individual is personally interested, and on the application of the Attorney General, to appoint a receiver to take charge of the property and effects of corporation, to collect whatever debts, claims or rights it may have, and to pay the debts of said corporation and finally liquidate the same. The third section of the Act declared that all laws or parts of laws in conflict therewith were repealed.

The third clause of Act No. 159 provided for the appointment of a receiver when the property of the corporation was abandoned or when by failure of the stockholders to elect or the refusal of the officers to serve, there was no one authorized to take charge of or conduct its

State vs. Debenture Redemption Co., Ltd.

affairs. In such case the appointment was to be made by the court at the instance of any stockholder or creditor.

The seventh clause provided for the case of a receiver where the corporation had been adjudged, not organized according to law or pursuing any business calling or avocation contrary to law. In such case the appointment was to be made by the court at the instances of any stockholder or creditor.

The association to take charge of whose assets and to liquidate its affairs, a receiver is asked in this case, never held the status of a corporation. It pursued a business under a claim of being such, which was against public policy and in the carrying on of which no law of the State authorized the creation of a corporation. The parties who organized it did not hold a legislative charter, but thought proper to assume themselves that under the general law authorizing citizens to create corporations by notarial act, the purposes they had in view were of character such as to fall under permissive provisions of the statutes. So soon as the State officials were advised that it was pursuing business, claiming to act under the authority of the law and under its protection, an injunction was issued to prevent the further continuance of business as corporation by it, and at their instance it was judicially decreed that it was not such business as would authorize the creation of a corporation to carry it on, and the association had never been legally such.

As this court declared in *State ex rel. Columbia Debenture Co.*, 51 Ann. 467, the State had no pecuniary interest in the subject matter of the action. The interest which it had was that which every person has to uncover and determine the action of another who should be professedly acting under and by virtue of his authority, particularly when such action is injurious to third parties.

The State had the right, as this court declared, to take the action it did and to hold matters in abeyance by injunction for the protection of all parties in interest until the termination of the suit. When that point had been reached and those parties had been placed in position to guard individually their own interests free from any question of estoppel, the State has performed its whole duty in the premises. It is not charged with the duty of championing the rights of parties who are themselves able to take care of them.

The effect of our judgment was to establish, judicially, that the so-called corporation was then nothing more and had been nothing more.

ab initio, than a number of private individuals engaged in the business they were carrying on under false pretensions to corporate rights and protection. That the assets of the concern were individual and not corporate assets and the liabilities were individual and not limited corporate liabilities. (Starke vs. Burke, 5 Ann. 741; Factors Insurance Co. vs. New Harbor Protection Co., 37 Ann. 239; Fleitas vs. City of New Orleans, 51 Ann. 17.) Every stockholder became liable at once to direct action at the instance of parties who had dealt with the association as a corporation. (Williams vs. Hewitt, 47 Ann. 1081.) The property and the liabilities being those of individuals, the State had no control over them through civil proceedings, unless under some special conditions which are not claimed to be presently existing. Had the persons who attempted to form a corporation, and to have it engage in business as such, not done this, but engaged in precisely the same business which the corporation would have carried on had it been organized, and had they incurred precisely the same liabilities and held the same assets, it would not be claimed that the State, of its own motion, could initiate civil proceedings to guard or protect the rights of individual creditors or stockholders. It is not charged that the parties connected with the association have attempted to act as a corporation, or done business as such since the institution by the State of its action, to have it declared that there was no such corporation as the New Orleans Debenture Redemption Company, nor that it has at present any outstanding liabilities, and had such allegation been made the evidence in the record would have disproved it. It is not intended that the action of the State was based upon any application to the Attorney General, or to the court for relief. There is no stockholder or creditor seeking redress, as required by the seventh clause of the act of 1898, nor has the property of the association been abandoned by those having charge of it. The evidence shows that all debentures issued have been surrendered, and all liabilities met and discharged except for an insignificant amount which has not been discharged, simply because not presented, and that the parties concerned are able and willing to pay the same. It is claimed, however, that this liquidation has been brought about irregularly and prematurely; that all the parties should have waited until a receiver had been appointed and permitted him to liquidate. If the parties in charge of the affairs of the association had, in making the liquidation, done so unjustly or improperly, and there had been complaints on that score, there might

Succession of Haley.

have been some ground for interference, but such is not the case. All parties are satisfied. Assuming that the liquidation was premature and even irregular, the penalty for an irregular and premature liquidation is not a useless and costly receivership. If there was a violation of the injunction in any way by the action of the parties in charge, the remedy was a proceeding for contempt taken in time. Receivership, after everything has been settled and liquidated, is not a substitute for a proceeding for contempt.

We see no useful purpose to be subserved by a receivership, and we see no legal interest in the State to act in the matter.

For the reasons assigned, it is ordered, adjudged, and decreed, that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered and decreed that the demand of the State be rejected and the rule taken in its behalf herein be dismissed.

No. 14,044.

SUCCESSION OF HELEN C. HALEY.

SYLLABUS.

This case involves only questions of fact.

A PPEAL from the Civil District Court, Parish of Orleans.—
Ellis, J.

Henry Chiapella and James B. Rosser, Jr., for Dative Testamentary Executors, Appellants.

Albert Voorhies, for A. H. Frederic, Opponent, Appellee.

The opinion of the court was delivered by

PROVOSTY, J. The opponent exhibits an act of mortgage, and mortgage notes identified therewith, all regular on their face, and testifies to the consideration of the notes, and supports his statement by a witness of unquestioned reliability who saw \$3000 of the money paid, the amount of the notes being \$5000.

As against this the succession offers practically nothing. True, the

State ex rel. Zeigler vs. Assessors et als.

nominal mortgagee testifies that he never lent any money to the deceased, but the effect of his testimony is entirely done away with by his saying that he knows of his having signed the act only because he recognizes his signature, and that he may have accepted the mortgage for somebody else, as is very frequently done when the real mortgagee prefers not to appear in the act. True, again, the opponent was tardy in urging his claim, but the delay is fully explained. The other circumstances pointed out by the representatives of the succession as casting a doubt on the verity of the plaintiff's claim, are of too inconsequential a nature to afford a basis for judicial action.

Prescription was interrupted by timely suit.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be affirmed.

No. 14,185.

STATE OF LOUISIANA EX REL. CHARLES W. ZEIGLER VS. BOARD OF
ASSESSORS ET ALS.

SYLLABUS.

Where, in a suit for the cancellation of an assessment, the sole question at issue relates to the validity of the assessment, no question of the constitutionality or legality of the tax being involved, and the amount of tax is less than \$2000 this court is without jurisdiction and the appeal will be dismissed.

A PPEAL from the civil district court, parish of Orleans—*St. Paul, J.*

E. Howard McCaleb, for plaintiff, appellee.

E. K. Skinner, for board of assessors, defendant, appellant.

Frank B. Thomas, assistant city attorney, for city of New Orleans, defendant, appellant.

Francis C. Zacharie, for state tax collector, defendant, appellant.

The opinion of the court was delivered by

MONROE, J. The defendant appeals from a judgment ordering it to

State vs. Guy et als.

cancel an assessment of \$15,000 in the name of the relator, for the year 1901, upon "merchandise or stock in trade in Standard Warehouse," etc.

It appears that the relator is conducting the business of a public warehouseman in New Orleans, and that the property referred to consists of sugar, rice, and other agricultural products, which belong to other persons and are stored therein; that he applied to the defendant within the legal delay, but without success, for the cancellation of said assessment; that his application was denied; and that he thereupon brought this suit. The defendant, by way of exception and for answer, alleges that the petition discloses no cause of action; that the plaintiff is estopped by reason of his failure to make a return of his property for assessment purposes, and that the assessment complained of is valid and correct. The appellee moves to dismiss the appeal on the ground that there is no question of the constitutionality or legality of a tax at issue, the sole matter in dispute relating to the validity of an assessment, and hence, the amount involved being less than \$2000, that this court is without jurisdiction *ratione materiae*. These grounds are well taken, and the motion must be sustained. *Adler, Goldman & Co. vs. Board*, 37 Ann. 507; *Favrot vs. Baton Rouge*, 38 Ann. 231; *Gillis & Kennett vs. Clayton, Assessor*, 33 Ann. 285; *Minor vs. Sheriff*, 38 Ann. 99; *Kock vs. Triche, Sheriff*, 52 Ann. 833.

It is therefore ordered, adjudged and decreed that the appeal herein be dismissed at the cost of the appellant.

No. 14,335.

STATE OF LOUISIANA VS. ZENON GUY ET ALS.

107	573
1124	83
124	617

SYLLABUS.

1. A bill of exceptions, in that part of it where the trial judge gives the reasons for his ruling, did not deny the previous statement of the bill that a witness, called in rebuttal by the State, was permitted to impeach a witness for the defense by giving evidence that defendant's witness had, on a previous trial, testified differently from what the State, in the instant trial, admitted he would swear to were he present—*Held*, that since the bill is signed by the judge, and since that part of it which he wrote does not deny the specific averment, it must be accepted as true and effect given to it.
2. Where the State admits, under Act 84 of 1894, for the purpose of avoiding a

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continuance, that an absent witness would, if present, testify to certain material facts, proof of counter-declarations made by the witness on another occasion will not be received in evidence. To admit the same would be in violation of the rule requiring a foundation to be laid before introducing the impeaching evidence.

A PPEAL from the Sixteenth Judicial District, Parish of St. Landry—*Lewis, J.*

Walter Guion, Attorney General, and *R. Lee Garland*, District Attorney (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Veazie & Pavy, for Defendant, Appellant.

The opinion of the court was delivered by

BLANCHARD, J. A bill of information was filed against Zenon Guy and several other parties, charging them with the larceny of three hogs. Guy was brought to trial and convicted. From a sentence of twelve months' imprisonment at hard labor, he appeals.

When the case was called for trial he applied for a continuance on the ground of the absence of certain witnesses, who had been subpoenaed on his behalf.

He was required to make a legal showing for continuance. This he did under affidavit. He set forth he expected to prove by J. E. Miller, an absent witness, that the hogs alleged to have been stolen were seen after the day upon which he (the accused) is charged to have stolen them, and that they were at the time ranging in the woods with the hogs of another party whose name is given.

The District Attorney, thereupon, admitted that if the witness Miller was present he would testify to the fact set forth in the affidavit. Act 84 of 1894.

On this, the trial Judge overruled the motion for continuance and proceeded with the trial.

The accused, in placing his evidence before the jury, read to them the affidavit for continuance as containing the evidence Miller would give if present, and the court instructed the jury that, under the admission of the State, they (the jury) were to receive and consider the evidence the same as though it had been given by Miller on the stand as a witness.

In rebuttal, the State offered a witness to prove, as the bill of excep-

tions recites, that on a previous trial of the case Miller had testified the hogs he had seen ranging in the woods were three other hogs belonging to the prosecuting witness, and not the three hogs forming the subject of the larceny.

The defense objected to this testimony on the ground that no foundation had been laid for proof of contradictory statements of the witness Miller.

The objection was overruled, the court holding it was competent for the prosecution to show that the testimony of the absent witness referred to other hogs and not to those alleged to have been stolen; that the witness was called to show that the hogs said to have been seen by Miller were not the hogs in question.

But the bill of exceptions, in that part of it where the Judge gives the reasons for his ruling, does not deny the previous statement of the bill that the witness, called in rebuttal by the State, was permitted to impeach Miller and to give evidence that he (Miller) on the previous trial had testified differently from what the State, in the instant trial, admitted he would swear to were he present.

Since the bill is signed by the Judge and since that part of it he wrote does not deny this specific averment, we must conclude the State's witness *was* permitted to testify that Miller, on the previous trial, had made statements contradictory to that put in his mouth by the affidavit for continuance.

This being so, the ruling of the trial Judge is reversible error.

Under the admission of the State, Miller is to be considered, for the purpose of the trial, as having been a witness placed on the stand by the defense, and that he testified the hogs *alleged to have been stolen* were seen by him after the day upon which the offense was laid, and that the very hogs so alleged to have been stolen were the ones he saw roaming in the woods.

It could not legally be shown by the State that he had made, at another time, a statement contradictory of this, without such time and occasion, place and circumstance, together with the statement, having been called to his attention, and he had been given the opportunity to explain.

So, too, where an attempt is made to impeach a witness by the showing of contradictory statements made by him in testimony given on a former occasion, the attention of the witness must be specially called to the passages in his previous testimony constituting the contradiction,

and he must be accorded the opportunity to explain, qualify, admit, or deny before the impeaching evidence is receivable.

It was, of course, competent for the State to show that the hogs Miller had seen and about which he had testified on the previous trial were different hogs from those stolen, but it was not competent to show that, while he *now testified*, or was put in the position of testifying, he had seen the very hogs alleged to have been stolen roaming in the woods subsequent to the theft, he had, on the previous occasion, testified the hogs he had thus seen were different hogs.

The State could show by competent evidence he was mistaken as to the identity of the hogs, but the State could not, without the proper foundation laid, show that while he now identified the hogs in the woods as those averred to have been stolen, he then declared they were a different lot of hogs.

See Am. & Eng. Ency. of Law, 1st ed., Vol. 29, p. 788 and notes.

Let the verdict herein be set aside, the judgment appealed from be reversed, and let the case be remanded to be proceeded with according to law.

Rehearing refused.

No. 13,697.

HERMAN LEVY VS. ELLA LEVY ET. ALS.

SYLLABUS.

ON MOTION TO DISMISS THE APPEAL.

Appellee should be cited personally or at his domicile when he resides in the State. If, after diligent search, he cannot be found by the sheriff and if he has no domicile at which to make a domiciliary service, citation served on his (appellee's) attorney will save the appeal from absolute dismissal. Delay will be granted in order that a regular service of appeal may be made.

The transcript having been filed in due time and all requirements having been complied with, except the service of citation of appeal, which was not made, because appellee could not be found, a citation of appeal may be served after twelve months have elapsed since the judgment of the lower court was rendered.

Another citation of appeal ordered and time granted.

ON SECOND MOTION TO DISMISS THE APPEAL.

Grounds of the motion were set forth by the appellee and decided by the court in denying the first motion.

107 576
112 545

107 576
117 780

107 576
123 843

Levy vs. Levy et al.

The same grounds cannot form the basis of a second motion to dismiss the appeal.

ON THE MERITS.

The owner ratified by notarial act a tax sale of her property, as legal (owned by plaintiff under the tax deed).

If there was an ulterior purpose, as alleged, in the ratification, not disclosed by the deed confirming the tax deed, and in reality the ratification made because it was expected that the property conveyed still remained, despite the tax sale, the property of the tax debtor, the purpose cannot be shown (over the purchaser's objection) by oral testimony.

The suit is, in its effects, *inter partes*. It is not a suit by forced heirs seeking their *legitime*, or by creditors to set aside a sale, but by the parties themselves who are personally bound, and also bound as heirs of the former owner of the property.

ON REHEARING.

A tax sale made in 1890 in enforcement of State taxes of 1889 on property assessed in the name of the original owner who died in 1876. His succession had been opened in 1881, when his sons were recognized as his sole heirs. His widow remained in possession as owner of one-half and usufructuary of the other half. The only notices recited as having been given were notices addressed to the original owner. The validity of the tax sale was put at issue in 1894. The widow ratified the sale. *Held*: Her ratification extended only to her undivided half. The sale as to the other half was set aside as invalid.

A PPEAL from the Civil District Court, Parish of Orleans—*St. Paul, J.*

Benjamin Rice Forman, for Plaintiff, Appellee.

William S. Benedict, for Defendant, Appellant.

The opinion of the court on the motion to dismiss was delivered by **BREAUX, J.**

The opinion on the second motion to dismiss was delivered by **BREAUX, J.**

On application for rehearing by **PROVOSTY, J.**

On rehearing by **NICHOLLS, C. J.**

ON MOTION TO DISMISS THE APPEAL.

BREAUX, J. From a final judgment signed on the 30th day of June, 1899, an appeal was taken.

The petition for the appeal was filed on the 25th day of June, 1900, and on the same day an appeal bond was filed and the appeal was made returnable on the first Monday in November, 1900.

In his petition for an appeal, appellant prayed that appellee be cited. The citation is addressed to plaintiff, Henry Levy, the appellee. The return of the sheriff on the citation sets out that on July second, 1900, due citation was made on the appellee by service on B. R. Forman, his (appellee's) attorney; that he, Herman Levy, appellee, was absent from the State. Appellee moves to dismiss the appeal on the ground that he has not been served with citation of appeal, as required by law.

The affidavit of appellee filed before this court sets out that his residence and domicile have for many years been in New Orleans, and that during the months of June and July, 1900, he was at No. 2423 Magazine street, where citation of appeal could have been served upon him at any time from June 30th, 1899, the date of the judgment appealed from, to the date the appeal was made returnable in November, 1900; and his place of business was at 528 Canal street, where he could have been personally served with citation.

The affidavit of the attorney for appellee states that when the deputy sheriff handed him the citation of appeal addressed to Herman Levy, he told the deputy that he (affiant) had no authority to accept service; that Herman Levy lived in New Orleans and could be served personally at his domicile.

On the other hand, on the part of the appellants, Ella Levy *et al.*, Lythe, the deputy sheriff, deposes that all effort to find Herman Levy at his domicile, No. 2426 Magazine street, proved unavailing; that he was then directed to serve it at his place of business, Levy, Loeb & Co., on Canal street; that, upon calling at that place, he was informed by one, apparently in authority, that Levy was absent from the State and was then in Europe. The affidavit of the other deputy also sets out that he failed to find the appellee after diligent inquiry, and that domiciliary service, for the reason stated, was not possible.

The appeal must be taken within the twelve months after the date of the judgment. The order of appeal was obtained and the appeal bond was given within the twelve months, and the transcript was filed before the return day.

Appellee, for a dismissal of the appeal, urges in the first place that citation of appeal must be served on the appellee personally, or at his

domicile, when he resides in Louisiana, and on the appellee's advocate, when he resides out of the State.

True, as urged by the appellee, that citation of appeal must be served on the appellee personally or at his domicile, when he resides in the State, but it does not always follow that the appeal must be dismissed in all cases of failure to comply with the law's requirements. The failure or inability of the sheriff to make the service of citation or an irregular service of citation of appeal may render it proper and legal to order another citation to issue and service to be made.

The contention of the appellee, for the dismissal is, that he was in the State, and that, in consequence, service should not have been made upon his attorney. The appellee may have been present; none the less, he could not be found, although diligent search was made for him by the deputies. It was equally impossible to make a service at domicile, for the reasons stated in the affidavit of these officers. A service made upon the attorney, under these circumstances, although not an entirely legal service, is not absolutely void.

In *Marshall vs. Watrigan*, 13th Ann. 619, the appellee had not been cited at all. Service was made on the attorney and sustained, on the ground that as the appellees had removed from the jurisdiction of the court in violation of law, appellant was not obliged to search for her beyond that jurisdiction, and that service upon her counsel was as good as if the appellee had departed from the State.

We take it, in the case before us for decision, that due search was made for this appellee and that he could not be found. It was the duty of the sheriff to serve the citation and make his return. He exercised his best endeavors to execute the duty, and failed, because the appellee could not be found. It was never within the law's contemplation that appellees should be benefited because of the sheriff's inability to find them or a domicile at which to make service upon them. The alternative in such a case, service on the attorney, may not be complete and sufficient and yet be complete enough for the appellant to bring up his appeal.

It must be borne in mind that the irregularity is due to the appellee himself, who could not be found, and who had no domicile at which service could have been made. It was not an irregularity for which the sheriff or the appellant could be held responsible. It would be different if the sheriff had made passing inquiry for the appellee which had not resulted in his finding him and had then called at the office of his

attorney and served citation of appeal upon the attorney. There was, as we take it, diligent inquiry made and it became thoroughly well known to the sheriff's department that no service could be made as required by the rules. It was only after this was well understood that service was made as before stated.'

As to the objection that citation of appeal was served on the attorney after the twelve months had elapsed after the date of the judgment, we will remark that it has been held that this also is not sufficient to dismiss the appeal when it does not appear that the delay is imputable to the appellant and when the service is made a sufficient number of days to be in time before the return day.

In *John Lewis vs. D. N. Hennen*, 13th Ann. 259, the court said that the appeal had been regularly taken and the bond was given in due form. The first citation was not served because of the absence of the appellee. It did not appear that the defect, error, or irregularity was imputable to the appellant; and, furthermore, it is no objection to the service of the new citation that more than twelve months had elapsed since the judgment of the lower court had been rendered. The proceedings required of the appellant had all been filed in due time and the court said that the "rest is cured by the statute." This was affirmed in *Jones vs. Weeks*, 14th Ann. 698, in which it was held that an irregular service of citation may be cured after the twelve months have elapsed since the judgment of the lower court was rendered.

Although the point was not raised in *Murphy vs. Factors' and Traders' Ins. Co.*, 33rd Ann. 455, yet it must have been evident to all concerned, as well as to the court, that the twelve months from the date of the judgment appealed from had elapsed when a second service was ordered. The rule met with this court's approval in *Cockerham vs. Bosley*, 52nd Ann. 65.

After citing another decision, we will bring our own to a close. In *Broussard vs. Broussard*, 2nd Ann. 769, the plaintiff alleged that she had not been cited at all. This, the court held, was not sufficient to authorize the dismissal of the appeal, that it is the duty of the clerk to issue, and of the sheriff to serve, the citation and make his return. No failure of these officers to do their duty can deprive parties of their right to be heard on appeal, but such neglect authorizes the granting of further time for citing the appellee.

It follows that the same rule should apply when the failure is not due to the officers, but to the fact that the appellee, after diligent search,

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could nowhere be found, and had no domicile at which to make a domiciliary service. *Hibernia National Bank vs. Sarah Planting and Refining Co.* (not yet reported). The motion to dismiss is denied.

It is therefore ordered that the cause be continued until the first Monday of January next in order that the appellee be cited to answer the appeal taken in this case.

ON MOTION TO DISMISS THE APPEAL.

BREAUX, J. This is the second motion by appellee to dismiss the appeal on the ground that he, as appellee, has not been properly cited to answer the appeal. It occurs to us that our first decree sustaining the appeal covers the objection raised in the second motion to dismiss. In the first motion, plaintiff and appellee averred that there was no legal service of citation of appeal; that he has lived in the city of New Orleans since his birth, and that his domicile was on Magazine street at the number stated. The court, in denying this first motion to dismiss the appeal, found that the sheriff had endeavored to make a legal service, but, owing to his inability to find plaintiff and appellant, he was unable to make a service either on the appellee personally or at his domicile, and that he had, after having advised with defendants and appellants' counsel, made service of the citation of appeal by leaving it with counsel for plaintiff and appellee at his office.

The question was considered by us and we, for reasons stated in our first opinion, ordered another service to be made. The service has been made as required, and it is therefore no longer possible to return to a consideration of the first ground decided.

The second motion to dismiss the appeal is overruled.

ON THE MERITS.

This is a suit by plaintiff to have himself decreed the owner of the lots of ground and improvements thereon situated in the First District of the city of New Orleans and numbered 23 and 24 in the square number 69.

He sets out in his petition that he bought this property from Lawrence Fabacher, who had bought it from the State tax collector at a public sale, made by the tax collector on the 24th day of May, 1890, for the State taxes of 1889.

He alleges that previous to the tax sale the property was owned by

the late Henry Levy, who, dying, left Sarah Klein, his surviving widow in community, in possession up to the date of purchase by Lawrence Fabacher; that in the year 1891, Sarah Klein, for a valuable consideration, confirmed the title in favor of plaintiff which (he) plaintiff and appellant, Herman Levy, now claims. Plaintiff sets out in his petition that Henry Levy had, at the date of his death, issue of his marriage with Sarah Klein, two children, viz., Alex and Leon Levy, and that these children departed this life prior to the death of Sarah Klein. Plaintiff claims that he owns the property in question, both by acquisition of the title from Fabacher and the acquisition from Sarah Klein, before named. It appears that Alex Levy and Leon Levy departed this life subsequent to their father. It follows that they inherited the undivided half of the property subject to the usufruct of their mother, Sarah Klein, but they died prior to their mother. But plaintiff urges that the said Alex and Leon Levy, having departed this life prior to Sarah Klein, their mother, the grandchildren (to-wit, the children of Alex and Leon Levy) of Sarah Klein could inherit from her, viz., Sarah Klein, the undivided half of the property, and that they, in consequence, could not have inherited it from their late father, Henry Levy. The position of plaintiff on this point is that as these children inherited from their grandmother directly, they are bound by her ratification of plaintiff's title, particularly as it is not shown that the ratification has aught to do with the *legitime* of these heirs.

Plaintiff pleads the tax title as forming one of the links in the chain of title. The heirs of Leon Levy, who are the grandchildren of Sarah Klein, are Ella, wife of Isidore Rich, and Jennie, wife of Leopold Klein, and the heirs of Alex Levy, who are also grandchildren of Sarah Klein, Jacques and Moses Levy and Adeline Levy.

Plaintiff avers that he has become subrogated to the rights of Lawrence Fabacher, and that he and his author in title have paid taxes due prior to his becoming owner of the property to an amount of about fifteen hundred dollars.

The action is for slander of title. The defendants claimed ownership and thereby became plaintiffs in a petitory action. The *onus* of proof is with them. They must sustain whatever strength there is in their own title.

He (plaintiff) charges that at the time of the purchase by Lawrence Fabacher, these heirs (who are plaintiffs in reconvention) were *sui juris*, and aware of the fact of the purchase, and they were also aware

of the fact that the purchasers were paying amounts of taxes as heretofore stated as due on the property; that they were willing at the time that plaintiff should have entire and perfect title to the property.

Plaintiff further charges that these defendants have slandered his title and have, thereby, prevented him from selling the property, and on these and other grounds he claims damages in the sum of twenty-five hundred dollars.

Plaintiff annexed interrogatories to his petition to be answered by these defendants. Defendants pleaded a general denial and, also, attacked the tax sale before mentioned, which Sarah Klein confirmed, on the ground that no assessment had been made of the property, no advertisement, and no demand of payment and on other grounds.

They (defendants) aver in this answer that this sale was made through the instrumentality of Herman Levy to Lawrence Fabacher and from Fabacher to Herman Levy, and confirmed to Herman Levy by Sarah Klein, his grandmother, in her interest for her benefit and for the benefit of the children and heirs of Henry Levy, Alex Levy and Leon Levy. They seek to recover interest they allege they have in the property and ask that plaintiff be ordered to account for the receipts and disbursements on said property.

The interrogatories propounded by plaintiff to defendants were answered. Motion was made to strike out the answers to interrogatories on facts and articles on the ground that they were improperly answered, not categorically, and attempted to inject into the answers things that do not belong to the case. The motion was granted in part and rejected as to the remainder of the answers.

There was also a motion made to compel the defendants to elect between two antagonistic and inconsistent positions, in that defendants in their answers set forth the invalidity of the tax sale in question, and they also set forth that, plaintiff who invokes this tax title, bought the property for the use, benefit, and advantage of the grandmother of the defendants; that the latter plea affirms the validity of the title, while the former denies it, and the two are inconsistent. The District Court declined to compel the defendants to elect as to their pleas.

Both pleas being before us for decision, we take up the first. The tax deed under which plaintiff holds contains the recital that the formalities required in order to convey title at tax sale have all been complied with. Defendants have not sought to prove any of the irregularities and

illegalities charged in their answer. The *onus* of proof was with the defendants by whom the tax deed had been attacked. The tax sale has a validity upon its face which must retain full, legal effect until it is shown that the declarations in the deed are not correct. The sale was made in 1890 and duly inscribed in the proper office. No question but that the taxes for which the property sold were due. Upon this branch of the case it only remains for us to affirm the judgment.

But defendants raise another issue which, in our view, goes far toward affirming the validity of the tax sale they attacked in this suit. They allege and contend that the property was purchased at tax sale for account of their grandmother (Sarah Klein).

They have failed to sustain their averment that the property was not that of the plaintiff, but of their grandmother. In their answer to the interrogatories propounded to them by plaintiff, and to which we have before referred, they sought to prove and sustain their defense by injecting testimony not called for by the interrogatories. This was excluded by ruling of the lower court, to which ruling we do not infer that objection is now urged. Defendants afterward, in the trial, sought to sustain their plea against the title of plaintiff by offering to examine other witnesses to prove by parol that plaintiff is not the owner, and that the deed under which he holds is a simulation. The defendants are not claiming as creditors, nor are they third persons. They are heirs who set up that the plaintiff is not entitled to the property. There is no question of *legitime* as issue. They are therefore bound by the action of their grandmother, who ratified by deed the title which they attack. All the evidence offered was oral and inadmissible to set aside a deed which has been ratified by all concerned.

The attack of plaintiff in reconvention upon plaintiff Herman Levy's title being based exclusively upon oral testimony, the rule of law which prevents persons *inter partes*, from attacking and setting aside their own deeds upon oral testimony, must be sustained. The defendants do not allege and show fraud and simulation; they are not forced heirs seeking to recover their *legitime*, nor creditors seeking to set aside a sale in fraud of their rights; all exceptions that do not apply to defendants' case.

Defendants' oral testimony could not be heard in order that they might substitute another title (oral) to plaintiff's title.

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Plaintiff, as a witness, testified in support of his deed. The attempt to impeach him as a witness and show that he held the title without consideration was not successful. No part of the testimony admitted in evidence, or no part of that excluded, shows, or has a tendency to prove that the sale in question was without consideration, as contended by plaintiffs in reconvention.

We do not think that the testimony sustains any demand for the damages claimed by the plaintiff. This demand was not pressed upon the court's attention. Our examination of the issues has resulted in convincing us that the issues as presented do not make out a case for damages.

By agreement of all the parties concerned, another suit was consolidated with this case. The judgment of the District Court rendered a separate judgment in the last mentioned case. We do not understand that defendants appeal from that judgment which was rendered in their favor.

For reasons assigned, it is ordered, adjudged, and decreed that the judgment decreeing plaintiff to be the owner of the property described therein and rejecting plaintiff's demand for damages, be affirmed.

ON APPLICATION FOR REHEARING.

PROVOSTY, J. A rehearing is granted in this case, restricted to the question of the validity or invalidity of the tax sale, in so far as concerns the interest of the two defendants in the undivided half once owned by their grandfather, Henry Levy, in the property in question and title to which they claim by inheritance; the inquiry being restricted to the irregularities alleged in the tax proceedings leading to the sale. The liability for costs to abide the final decision.

ON REHEARING.

NICHOLLS, C. J. A rehearing was granted in this case restricted to the question of the validity or invalidity of the tax sale, in so far as concerns the interest of the two defendants to the undivided half once owned by their grandfather, Henry Levy, in the property in question, and title to which they claim by inheritance, the inquiry being restricted to the irregularities alleged in the tax proceedings leading to the sale.

The property involved in this litigation was purchased by Henry

Levy during his marriage with Sarah Klein. Henry Levy died in March, 1876, leaving as his heirs "his sons, Alexander Levy and Leon Levy, issue of his marriage with Sarah Klein. His succession was opened in the Civil District Court for the Parish of Orleans, and the two sons were, on the 21st of July, 1881, recognized by judgment of court as his sole heirs to the property in question, their mother being entitled to the undivided half as widow in community, and holding possession of the other half under her usufructuary rights.

Leon Levy died on the 3rd of August, 1889, and *Alexander Levy* died on the 18th of August of the same year.

Their mother, *Sarah Klein*, died on the 23rd of February, 1894. On the 24th of May, 1900, two lots claimed by the plaintiff were separately sold at tax sale in enforcement of State taxes of 1889, assessed upon it in the name of Henry Levy, and adjudicated to Lawrence Fabacher; deeds to Fabacher were executed on June 12, 1900.

On the 21st of July, 1891, Fabacher, by notarial act, sold and assigned, but without warranty, to the plaintiff, Herman Levy, a son of *Alexander Levy*, and the plaintiff herein, all his (Fabacher's) rights, title and interest in and to the two lots adjudicated to him, for and in consideration of recited price of five hundred dollars, which the vendor acknowledged he had received and for which he gave acquittance.

The titles were declared to have been based on the tax adjudications referred to. *Mrs. Sarah Klein*, the mother of Herman Levy, intervened in this act, and took cognizance of the sale to him by Fabacher. She referred to the tax adjudications and acknowledged that they were valid and binding; that she had no defenses to urge against the same, and that title to the property had vested absolutely in Fabacher by non-redemption of the same within the period fixed by law.

In view of the premises and in consideration of the sum of five hundred dollars then and there paid to her by Herman Levy, she "relinquished, abandoned, remitted, transmitted and forever quit-claimed to the latter (which quit-claim Herman Levy accepted) all such rights, title, interest, claim, pretension, action or cause of action she might have had in the properties, binding herself to warrant him and his heirs or assigns against all person or persons lawfully claiming the same in the quiet and peaceable possession of the same forever."

On the 12th of March, 1894, the plaintiff instituted the present action of slander of title against Ella Levy, wife of Isidore Rich, and Teenie

Levy, widow of Leopold Klein, the daughters and sole heirs of Leon Levy.

On the 24th of March, 1894, the defendants answered. They averred: That plaintiff has no legal nor equitable title to the property described in his petition, for this, namely: That the tax sale under which his vendor acquired, and under which Sarah Klein Levy confirmed to him for family purposes, was and is null and void, because:

1st. A proper assessment of said property was not made.

2nd. That notice of demand of payment, of advertisement, of the sale of said property was not made or given as required by law, your respondents being then non-residents and in ignorance of what was done.

3rd. They aver the sale was made and had through the instrumentality of Herman Levy to Lawrence Fabacher, and from him to Herman Levy, by Sarah Klein Levy, his grandmother, in the interest and for the benefit of their said grandmother, and the children and heirs of Henry Levy, Alex Levy and Leon Levy, and without any other consideration to said Sarah Klein Levy, and with the view and object of placing said property in the name of Herman Levy, as a living person, to collect the revenues thereof, pay the legal charges and taxes accrued thereon, and with the surplus of proceeds thereof, to contribute to the support of their grandmother, Sarah Klein Levy, in the same manner he and Alex Levy before had done, prior to said tax sales; said tax sales and confirmation being without the knowledge of these defendants, and concealed from them until January, 1894."

On the 25th of April, 1894, by act before Dreyfous, notary public, Leopold Klein, husband of Teenie Levy, executed a power of attorney to Isidore Rich, in which he, among other matters, empowered him "to authorize my (his) wife in all acts and matters in which such authorization is necessary, particularly to authorize her to defend the suit against her instituted by Herman Levy or to enter into that connection into all contracts, covenants and agreements as may be requisite; to sign all bonds of appeal or other needful bonds, or to assist her in any compromise and composition as she may deem most advisable in her interest." On the 15th of May, 1894, Ella Levy, wife of Isidore Rich, and Teenie Levy, wife of Leopold Klein, and Isidore Rich to aid and authorize his wife and under the said power of attorney to aid and assist Mrs. Klein, executed an act before Cohn, notary, in which it was recited that, whereas, Herman Levy is the apparent owner of certain

real estate hereinafter described, situated in this city, and whereas they are desirous of giving a full quit-claim to said Levy thereto, and of his ratifying his title thereto,—therefore, in view of the premises, and for a full and valuable consideration received by them, as they hereby acknowledged, they do respectively, by these presents, relinquish, abandon, remise, transfer and forever quit-claim unto the said Herman Levy, his heirs and assigns, all of which the said Herman Levy hereby accepts, all such rights, title, interest, claim, pretensions, action or cause of action which they might have or might have had in and to the following described real estate, hereby binding ourselves to warrant said Levy, his heirs and assigns against all persons lawfully claiming the said property in the quiet and peaceable possession of the same forever.” (After this follows a description of the properties declaring them to be the same properties acquired by Lawrence Fabacher at the tax sales.)

Herman Levy did not sign this act, though it was evidently contemplated that he should have done so. This quit-claim deed was recorded on June 27th, 1894.

On the 26th of June, 1894, Herman Levy sold these lots under full warranty and with subrogation to Frank J. Nusloch for five thousand dollars—twenty-five hundred dollars cash, the balance represented by three notes of the purchaser, payable to his own order and by him endorsed, secured by special mortgage and vendor's privilege on the property. The plaintiff repudiated and repudiates the claim that the tax sales here made for the reasons and purposes stated in the answer and maintains and contends that they were made not by consent, but adversely to the owners; that Fabacher obtained a full, absolute and complete title to the lots which he himself subsequently acquired, solely on his own account and which he caused his mother to have confirmed and ratified for a valuable consideration passing to her from himself.

*The quit claim from the defendants to the plaintiff is not referred to in the pleadings, nor are any claims urged and asked upon it. It was evidently executed under some compromise arrangement or reservation.

Mrs. Sarah Klein only owned the undivided half of the property; her ratification and quit-claim covered nothing more than her own interest in the property. She could bind herself, but not bind the defendants holding an interest in the other undivided half as heirs of their father, Leon Levy, and the plaintiff denies that she intended or attempted to do so.

Unless the defendants have concluded themselves in some way we think their interest in the properties as heirs of their father was not divested by the tax sales referred to. They were made in enforcement of the delinquent taxes of 1889, under an assessment made in the name of Henry Levy. He was not the owner at that time, but had been dead a number of years. The father of the defendants had been recognized as one of his heirs as far back as 1881 by judgment of court and his mother, Sarah Klein, was in possession as usufructuary at the date of the tax sales.

The deed refers to *Henry Levy* as being the delinquent taxpayer and declares that the notices given were sent to him. An assessment of the property made at that time in the name of Henry Levy and notices sent to him were not under the circumstances of the case a compliance with the requirements of the law. We set aside a tax sale in *Genella vs. Vincent*, 50 Ann. 966-967, under circumstances very similar to the present. The property in that case had been sold under an assessment in the name of Catherine Neidergang. She had removed from New Orleans to Switzerland years before and had died there, bequeathing her property to her husband, Jaquier. Her succession was opened in New Orleans and her husband recognized and placed in possession. At the time of the tax sale Jaquier was absent from the State, but the property was in possession of his tenant. In the tax deed the notices required by law to be given were declared to have been given to the delinquent tax debtor and the delinquent tax debtor in the deed declared to be Catherine Neidergang.

At the time of the tax sale which is involved in the present litigation, Teenie Levy, wife of Leopold Klein, was owner of one undivided eighth interest in each of the two lots described in plaintiff's petition as heir of her father, Leon Levy, and Ella Levy, wife of Isidore Rich, was owner of one undivided eighth interest in each of said lots described in plaintiff's petition as heir of her father, Leon Levy. We are of opinion that the said Ella Levy and the said Teenie Levy were not divested of their said interest in the property by the tax sales referred to in the pleadings, and that they are still the owners of the same. We are strongly impressed with the belief that Fabacher was merely a party interposed to hold title, and that the real adjudicatee at the tax sale was either Mrs. Sarah Klein or Herman Levy. It will be remembered at the time of the tax sales the latter was himself a joint owner in the properties by reason of his heirship of his father, Alexander Levy.

If the plaintiff in this suit has made payment of taxes on the property, towards the payment of which defendants should have contributed, he has the right to enforce such contribution now. The continued possession of the property has given rise to reciprocal rights and obligations between the parties which should be liquidated and the property partitioned, if the parties elect to put an end to their joint ownership. The record is not in a situation to enable us to pass upon these questions, and the cause must be remanded for that purpose.

For the reasons herein assigned, it is ordered, adjudged and decreed that the defendant, Ella Levy, wife of Isidore Rich, and the defendant, Teenie Levy, wife of Leopold Klein, are owners each of one undivided eighth interest in each of the lots of ground described in the petition of the plaintiff herein, the tax sales of the said properties by C. Harrison Parker, State tax collector, on the 24th of May, 1890, at which said properties were adjudicated to Lawrence Fabacher, to the contrary notwithstanding, and it is hereby ordered, adjudged and decreed that the said tax sales and the said adjudications be and they are hereby decreed, to the extent of the said interest of the said parties in said properties, null, void and of no effect, and that the same be set aside. It is further ordered, adjudged and decreed that the former decree of this court rendered in this matter, to the extent herein just adjudged and decreed, be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that this cause be remanded to the District Court and there reinstated on the docket, and that that court cause, by proper proceedings, to be ascertained, adjusted and liquidated the respective rights and obligations of the parties hereto arising out of and relating to said properties.

It is further ordered, adjudged and decreed that the plaintiff pay the costs of this appeal, defendants to pay the costs of the District Court. It is further ordered, adjudged and decreed that our former decree and judgment herein, except as herein altered and amended, remain undisturbed and affirmed.

BREAUX, J., dissents.

No. 14,131.

MRS. M. D. C. CANE vs. E. B. HERNDON.

SYLLABUS.

1. Under article 210 of the constitution of 1879, and act 85 of 1888, it was not obligatory upon the tax collector to recite in his tax deed the fact that, before offering the property as a whole, he had offered the least quantity that any bidder would buy for the taxes, interest and costs due thereon, and, if it be a fact that such previous offering was made, the tax purchaser should be permitted to prove it by evidence *abundante* unless to do so would be to contradict the positive recitals of the deed.
2. Where the tax deed, in such case, is susceptible of interpretation, the presumption established by the constitution in favor of its *prima facie* validity extends to the meaning of the language used, and it will be presumed, *prima facie*, that, of two possible meanings, that meaning was intended agreeably to which the deed may be valid rather than that which must render it void.
3. Where two or more vacant lots, of the same size and value, in a city or town, are assessed together, for a lump sum, the constitutional requirement, as to offering the "least quantity," may be complied with, either by offering one of the lots or by asking bidders to compete by stating and designating the least quantity that they may be willing to buy for the taxes, interest and costs due on the whole.
4. The failure of the collector to offer the least quantity before selling the whole property affects the title with a vice for which it may be annulled in an action brought within the legal delay, but which is not so radical as to protect the owner against the prescription denounced by section 66 of act 85 of 1888, or section 5 of act 105 of 1874.

A PPEAL from the First Judicial District, Parish of Caddo—
Land, J.

David Thompson Land and *Henry Hunsicker*, for Plaintiff, Appellant.

Alexander & Wilkinson, for Defendant, Appellee.

The opinion of the court was delivered by

MONROE, J. Plaintiff alleges that she owns lots 14 and 15, in square No. 54, in the city of Shreveport; that the defendant is in possession thereof, claiming under a tax title, and that said title is void for the reasons, that the deed from the tax collector shows upon its face: (1) That the least quantity of the property which any bidder

107	591
109	121
107	591
110	86
107	591
112	221
114	116
107	591
118	850

would buy was not offered, but that the whole was sold in block, and (2) that said property was not sold for the amount of the taxes, interest and costs. It is also alleged that the defendant is a possessor in bad faith, and there is a prayer for judgment, decreeing his title void, and condemning him for rents and revenues, etc. The defendant pleads the prescription of one, two, five and ten years, affirms the validity of his title and alleges that he has been in open, peaceable, and uninterrupted possession thereunder, since January 11, 1889. He further alleges that, in December, 1886, the said property was offered for sale by the sheriff under a judgment and writ of *feri facias* against the plaintiff for over \$40,000 and was adjudicated to him for \$550, and that said amount was then and there paid by him and credited on said judgment, and that plaintiff is estopped to assert the claim here set up by reason of the fact that she received the benefit of said payment and of the further fact that she has stood by for twelve years, or more, without asserting said claim, during which time large judgments standing against her have become prescribed, and respondent has been in possession of, and has paid the taxes on, the property in question. He prays that the demand be rejected, but that, in the event of his eviction, he be granted judgment for said \$550, and for the taxes disbursed by him, with interest, etc.

The evidence fails to show that the defendant acquired any title by virtue of the adjudication of the sheriff on December 4th, 1886, as it is admitted that there was no *process verbal* of adjudication, and no deed by the sheriff. It also fails to show that the amount paid by the defendant was credited on any judgment or *fi. fa.* against the plaintiff, that it enured to her benefit, or that she was ever made aware that the property in question had been adjudicated to the defendant. The defendant and the, then, sheriff (who has been out of office for several years) testified orally (over the objection of the plaintiff's counsel) to the fact of the adjudication and to the amount. The defendant testified that he had subsequently paid said amount to the minors, plaintiffs in the writ, through their tutor, and the account furnished by the tutors to his wards was introduced (also over the objection of plaintiff's counsel) for the purpose of showing that the tutor had charged himself with said sum. We agree with the judge *a quo* that the oral testimony was admissible as showing that the defendant had bid a certain amount for the lots in question and that he had paid said amount to the tutor, but we do not think that the account furnished by

the tutor, who was not put on the stand, was admissible as against the plaintiff, who was not a party thereto and was afforded no opportunity to cross-examine its author. We, therefore, dismiss the matter of the sheriff's sale, of December 4th, 1886, and proceed to the consideration of the tax deed of January 11th, 1889.

Article 210 of the Constitution of 1879 reads, in part, as follows:

"The collector shall, without suit, and after giving notice to the delinquent in the manner to be provided by law (which shall not be by publication—except in the cases of unknown owner) advertise for sale the property on which the taxes are due in the manner provided for judicial sales, and, on the day of sale, he shall sell such portion of the property as the debtor shall point out, and, in case the debtor shall not point out sufficient property, the collector shall, at once and without further delay, sell the least quantity of property which any bidder will buy for the amount of the taxes, interest and costs. * * * All deeds of sale made, or that shall be made, by collectors of taxes shall be received in evidence by the courts as *prima facie* valid sales."

The act of 1888, No. 85, under the authority of which the sale in question was made (section 63) provides: "That each state tax collector * * * shall execute and sign, in person or by deputy, in the name of the State of Louisiana, a deed of sale to the purchaser of any real estate sold for taxes, in which he shall relate, in substance, a brief history of the proceedings had; shall describe the property, state the amount of the taxes, interest and costs, and the bid made for said property, and the payment made to him in cash, and shall sell said property to the purchaser with the right to be placed in actual possession thereof," etc. The deed under which the defendant claims reads:

"State of Louisiana, Parish of Caddo.

"Be it known that this day, before me * * * came and appeared John Lake * * * collector of state and parish taxes for said parish, acting herein under and by virtue of the authority vested in him by the constitution and laws * * * and in the name of the state of Louisiana, who declares that he does, by these presents, sell, convey and deliver unto E. B. Herndon the following described property assessed to M. D. C. Cane upon the tableau of taxes in and for said parish of Caddo for the year 1888, to-wit: Lots 14 and 15 in block 54, city of Shreveport. The said property was advertised in the Shreveport Democrat, a newspaper published in said

parish, from the 29th day of April to the first day of June, 1899, making full thirty clear days from the date of the first insertion to the day of sale, announcing said sale to take place at the front door of the civil district court house of said parish within the legal hours of sale on the 1st day of June, 1889. When on said sale day, between said legal hours of sale, and at said court house door, after first having read the advertisement announcing the amount of taxes, interest and costs due on said property for the year 1888 proceeded to offer the said described property for sale, for cash, without appraisement, in legal tender money of the United States, to pay and satisfy said taxes, interest and costs, when, at said offering, the said E. B. Herndon having bid the sum of nineteen and 95-100 dollars for said property became the purchaser thereof at that price, subject to redemption, as provided by law. This sale is made for the consideration of the sum of nineteen and 95-100 dollars, cash in hand paid, the receipt of which is hereby acknowledged. The said sum being for taxes \$14.70, interest \$—, advertising \$— and costs \$5.25, making said sum of nineteen and 95-100 dollars." This act bears date, June 11th, 1889, and was recorded on the same day. It is not suggested that there was any defect in the assessment or that the plaintiff did not receive notice of the intended sale. The allegations are, that the tax deed shows on its face that the requirements of the constitution were not complied with, in that it shows that the property was offered in block, without there having first been offered the least quantity that any bidder would buy for the amount of the taxes, interest and costs; and that it also shows that it was not sold for the amount of the taxes, interest and costs.

The ground of attack last mentioned is predicated upon the idea that the recital in the deed; "the said sum being for taxes \$14.70, interest \$—, advertising \$— and costs \$5.25, making said sum of \$19.95," is to be construed as meaning that the collector sold the property for \$14.70 of taxes, and \$5.25 of costs, and that he received nothing in the way of interest. We do not so interpret the language used. Neither the constitution nor the statute require that the different items of taxes, interest and costs be specified in the deed, and, whilst the collector has specified the amount of the tax, separately, we understand him to have aggregated the items of advertising, interest and costs in one amount. This becomes obvious if the blanks which are left in the deed, as prepared, but which were not filled, be omitted, thus—"the said sum being for taxes \$14.70, interest, advertising and costs \$5.25,

making said sum of \$19.95." No attempt was made, though the ex-collector was on the stand as a witness, to show that the amount for which the property was sold did not include all taxes, interest, and costs due, and we have no reason to assume that the collector failed to discharge his duty in that respect.

Considering the remaining grounds of attack relied on by plaintiff, in connection with the plea of prescription which has been interposed, the questions suggested are: (1) Does it appear, affirmatively, from the recitals of the tax deed, that the collector offered the property in block without having previously offered the least quantity that any bidder would buy for the amount of the taxes, interest and costs; (2) is it competent to show by proof *aliunde quam* the deed, that such previous offering was made; (3) if it be held that such proof cannot be received, or, being received, that it fails of its purpose, and that, as a matter of fact, the collector offered the property in no other manner than in block, is the resulting defeat in the title of such a character as to deprive the holder of the benefit of the prescription on which he relies?

The judge of the district court reached the conclusion that the deed does not show upon its face that the collector failed, before selling the property in block, to make the effort required by the constitution to sell the least portion that any bidder would buy for the amount of the taxes, etc.; and that it was competent for the defendant to prove, by oral testimony, that such effort was made without success; and that even though the collector had failed to offer the property otherwise than in block the resulting defect would not be so radical as to place the title beyond the protection of the prescription invoked. From his very able opinion we make the following excerpts:

"Act 85 of 1888, in section 63, provides, that the tax collector, in his deed, "Shall relate, in substance, a brief history of the proceedings had, shall describe the property, state the amount of the taxes, interest and costs and the bid made for said property and the payment made to him, in cash, and shall sell said property to the purchaser," etc. Sec. 66, of the same act, provides, "All actions to annul tax sales for any irregularities or informalities of whatever nature shall be prescribed by two years from the day the tax collector's deed is recorded." This act requires certain specific recitals in the tax deed, but as to all other formalities "a brief history of the proceedings." Does the failure to mention in the "brief history of the proceedings" any one of the

various proceedings required of the tax collector by the revenue law of the state render his deed *absolutely null and void on its face*? This question is answered by article 210 of the constitution of 1879, in the provision making all tax deeds *prima facie* evidence of valid sales."

* * * * *

"Assuming that the tax deed shows a sale in block and that evidence is not admissible to show that the tax collector first offered the least quantity that any purchaser would buy, the question arises as to the nature of such defect or irregularity in the proceedings. Is it a nullity or defect that is so absolute and radical that it cannot be cured by any of the prescriptions pleaded? That such a defect is a ground of nullity is conceded, and is shown by the following adjudged cases, viz: Norris vs. Hayes, 44 Ann. 907; Land and Improvement Co. vs. Succession of Fasnacht, 47 Ann. 1294; Bristol vs. Murff, 49 Ann. 357. These were suits to annul tax sales. Prescription was not pleaded, and the nature of the nullity, whether relative or absolute, was not discussed. The question is therefore *res nova* in our jurisprudence." Our learned brother then proceeds to cite authority to the effect that "the validity of tax sales is to be tested under the same principles as judicial sales;" that "irregularities and defects, growing out of any judicial sale, which may be cured by monition, include any informality in the order, decree, or judgment of the court under which the sale was made, or any irregularity in the appraisalment, or advertisement, in time or manner of sale, or any other defect whatsoever," save want of citation, and that such irregularities and defects in tax sales are cured by monition or prescription, and to the further effect that, notwithstanding the jurisprudence, which he recognizes, holding that the prescription of three and five years does not apply to cases in which there is want of notice, radical defect in the assessment, or no law authorizing the sale, it has not been held, since the decision in Barrow vs. Wilson, that such prescription does not bar an action to annul a tax sale "on account of informalities, irregularities, or illegalities, *connected with the sale.*" And he concludes that the present action is therefore barred by the prescription of three and five years.

It is certainly true that neither the constitution of 1879 nor the statute under which the sale in question was made, required, as a condition precedent to the validity of the title resulting from such sale, that the deed should specifically recite that, before offering the property in block, the collector had offered the least quantity that any bidder

would buy for the taxes, interest and costs. If, therefore, as a matter of fact, the collector first offered the least quantity, the only thing of which the plaintiff could complain would be, that in relating "in substance, a brief history of the proceedings" he had omitted to mention such offer, and the complaint would be entitled to no consideration for the double reason that such mention is not required and that its omission could work no injury. The plaintiff, however, complains that as a matter of fact, the least quantity was not offered, and it is said that the recital in the deed is conclusive to that effect and cannot be contradicted by the oral testimony of the defendant, or of the collector, whose term of office has expired. The recital in question reads: "When, on said sale day * * * after first having read "the advertisement, announcing the amount of the taxes, interest and costs due on said property for the year 1888, proceeded to offer said described property for sale, for cash, without appraisement * * * when, at said offering, the said E. B. Herndon, having bid the sum of \$19.95 * * * became the purchaser," etc.

It is true that there is no affirmative statement in this recital to the effect that the least quantity of the property that any bidder would buy for the taxes, interest and costs, has been offered, before the offer of the whole. And it is equally true that there is no statement that the debtor had failed to point out the property to be seized, though it is only in that event, by the express terms of the constitution, that the collector is authorized and required to sell "the least quantity," etc. Upon the other hand, the statement, as made, and the fact, the non-existence of which the plaintiff alleges, and the existence of which the defendant asserts and offers to prove, that the whole property was offered only after the offering of such least quantity, may very well stand together, so that the effect of the testimony to which the plaintiff objects is not to contradict the recitals of the deed, but merely to show that the collector took certain steps, which were required to be taken, but which do not appear, and which are not required to appear, from those recitals. It is to be remembered in this connection, that, besides those provisions of article 210 of the Constitution of 1879, upon which the plaintiff relies there is the further provision, that "All deeds of sale made, or that may be made by collectors of taxes shall be received in evidence by the courts as *prima facie* valid sales."

The *prima facie* presumption, therefore, in the case of a tax sale which is open to construction, is, that the meaning intended by the

language used is such as would give effect to the deed rather than render it void upon its face. And it is for the attacking party to show that such a construction is inadmissible, or is unsupported by fact. This has not been done in the instant case, but, on the contrary, the testimony which was objected to was offered by the defendant in support of, and sustains, a construction of his deed, of which it is fairly susceptible, and which gives validity to his title. And we are of opinion that the testimony was properly admitted. Nor do we think that this view conflicts with the ruling in *Norris vs. Hayes*, 44 Ann. 912, and *Bristol vs. Murff*, 49th Ann. 357, since, in neither of those cases was there any attempt to show that the collector offered the "least quantity," etc., before offering the whole property, and it may be assumed that the recitals in the deeds then before the court, though similar to those upon which the present defendant relies, were intended to mean, and, for that reason, were accepted as meaning, that no preliminary offer of the least quantity of property was made. It does not follow, however, that those recitals were susceptible of no other interpretation, or that such meaning would have been attributed to them if it had been shown that it did not accord with the fact. There is some difference between the testimony of the defendant and that of the ex-collector as to the manner in which the offer of the least quantity of the property in question was made; the defendant testifying that one of the two lots was offered, and the collector, that the offer was made in his "usual manner," which was, to ask "what is the least amount of this property that any bidder will take and pay the taxes thereon?" (Including interest and costs.) If there was an offer to take less than the whole, he would then ask, "What specified part?" If, on the other hand there was no offer to take less than the whole, he would ask "Who will take the whole of this property and pay the taxes, etc?" And the sale would be made to the bidder who would be willing to pay the amount due in consideration of the adjudication to him of the least portion of the property, or of the whole, as the case might be. We are of opinion that, for the purposes of this case, in which there were two vacant lots, of the same size and value, assessed together, for a lump sum, either method of offering would have fulfilled the requirements of the law, the object of which was, and is, to prevent the sale, unnecessarily, of a number of town lots, or of a large tract, or tracts, of land in the country, the taxes upon which might be realized, in the one case, by the sale of one, the least valuable, lot, and in the other, by the sale of an inconsiderable portion of the land.

Beyond all this, however, is the question: if the collector fails to offer "the least quantity of the property," before offering and selling the whole, is the resulting defect in the title of such a character as to deprive the tax purchaser of the benefit of the prescription which is here relied on?

Article 3543 of the Code provides that "All informalities connected with, or growing out of, any public sale, made by any person authorized to sell at public auction, shall be prescribed against by those claiming under such sale after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons."

Section 5 of act 105 of 1874 reads, "Any action to invalidate the titles to any property purchased at tax sales under and by virtue of any law of this state shall be prescribed by the lapse of three years from the date of such sale."

The concluding paragraph of section 66 of act 85 of 1888, being the statute under the authority of which the property in question was sold, declares that "all actions to annul tax sales for any irregularity or informalities of whatever nature shall be prescribed by two years from the day the tax collector's deed is recorded."

The last section of this statute repeals "All those parts of laws, on the subject of levy, assessment and collation of state taxes, heretofore enacted, which are in conflict with the constitution of the state, or are inconsistent with, or superseded by, or contrary to, or in conflict with," its own provisions.

The prescription of five years, established by the Code (from the date of the sale) against "informalities" in any public sale, are clearly inconsistent, as to the matter of time, with the prescription of two years (from the recording of the deed) against "irregularities or informalities" in "tax sales" established by the act of 1888 and, we may, therefore, leave the article of the Code out of the question in this case.

The acts of 1874 and of 1888 may stand together, by holding that the latter applies merely to "irregularities and informalities" in tax titles, whilst the former is still in force as establishing the prescription of three years against more serious defects. In *Person vs. O'Neal*, 32 Ann. 327, and *Lague vs. Boagni*, *Ib.* 912, it had been held, before the adoption of the act of 1888, that the prescription of three years, under the act of 1874, was inapplicable, in the one case, where property had been sold for taxes without notice to the owner, and, in the other

where the property had been assessed in the name of a person, not the owner, whilst the title of the owner was spread on the public records, the purchasers were shown to have been aware of the defects, and it did not appear that they were in possession. These cases were reviewed in *Barrow vs. Wilson*, 39th Ann. 403, and the case of *Person vs. O'Neal* was overruled, whilst the case of *Lague vs. Boagni* was differentiated and practically sustained. It was also held that neither the prescription of three nor five years applied to the right of action of a minor to annul a tax sale. In *Breaux vs. Negrotto*, 43 Ann. 441, the court, in part, overruled *Barrow vs. Wilson* and returned to the doctrine, announced in the case of *Person vs. O'Neal*, that "whatever defects in a tax sale may be cured by the lapse of three years, the want of personal "notice to the owner, or his agent or curator, cannot be, because such notice is a condition precedent to the seizure, without which there could be no sale," and this doctrine has since been repeatedly affirmed. But the court has gone no further, nor do we find any sufficient reason for doing so at this time. A law authorizing an assessment and sale of property for taxes, an assessment under the authority of, and as required by, such law, and the notice to the owner, as required by the constitution, of the intention to sell, were regarded, as conditions precedent, without the existence or observance of which it was considered that a proceeding leading to the sale of property for taxes was of no binding force or effect and the title resulting therefrom, in contemplation of law, no title at all, and, hence, incapable of being validated by prescription. If, however, property is legally assessed, and the owner receives notice of the intention of the collector to sell it for the taxes due, it may reasonably be presumed that he will avail himself of the opportunity thus offered to protect his rights by insisting that all the conditions, as to the manner of the sale, and especially those which are imposed for his benefit, shall be strictly observed. If he stands by and allows the property to be sold in disregard of such conditions there can be no reason, unless it be that the state is without power in the premises, why the prescription established by law should not protect the purchaser in his title. As to the policy of such legislation and the power of the state, all writers and jurists are agreed. "The policy of such laws is unquestionable, and the power to enact them is undisputed." *Cooley on Taxation*, 376. "Public policy demands the enactment of such laws and they are universally sanctioned by the practice of nations and the consent of

State vs. Perlioux.

mankind." Blackwell on Tax Titles, 643. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation over all persons and property within its jurisdiction." McElmoyle vs. Cohen, 13 Peters, 312.

Whatever merit, therefore, there might be in the position of the plaintiff's counsel, and it has certainly been most strongly presented, that the deed under which defendant holds is not subject to interpretation, or explanation, we should still be obliged to hold against his client on the subject of prescription. Conceding that a tax sale may be annulled, in an action brought within the time prescribed by law, because of the non-observance of the legal requirements as to the offering of less, before selling the whole, property, it nevertheless remains that such action may be barred by prescription. The only question to be determined being, whether the law was intended to apply to it. For reasons which were considered sufficient, it has been held that the prescription established by the law of this state was inapplicable in certain cases, where to have held otherwise would have been, in effect, to have deprived the owners of their property under circumstances which it was not believed were within the contemplation of those laws. But the policy of the state has been more emphatically declared in the present constitution, and in the statute adopted pursuant thereto, and, whilst this recently enacted law does not control in the case now before us it does not, upon the other hand, encourage the courts to go farther than they have done, on behalf of the tax payer, in the matter of construing the statutes of prescription.

Judgment affirmed.

Rehearing refused.

No. 14,132.

STATE OF LOUISIANA VS. HORTER J. PERIOUX.

SYLLABUS.

1. A man, called as a jurymen, answered, on his *vow d're*, to counsel for defense, he thought the man who committed the homicidal deed ought to be punished and that as soon as he heard of the case he formed that opinion. Challenged for cause, he was questioned by the court and answered he had no prejudice

107	601
110	123
110	150
107	601
113	802

107	601
118	150
107	601
113	137

against the accused; as a juror, would decide the case according to the evidence as given by the witnesses and the law as expounded by the court; no outside impression or opinion would influence him in his verdict. *Held*, competent as a juror.

2. The mere expression by a citizen of a just indignation on hearing of the death by violence of another, does not disqualify him from jury service in the case.
3. It is objectionable for the defense to ask of jurors, on their *voir dire*, questions like the following:—"In a criminal prosecution, as a juror sworn to try a case and when forming your verdict, to whom would you give the benefit of the doubt—the State or the accused?" "If accepted on this jury would you give the benefit of any doubt created in your mind by the evidence to the accused and acquit him?" "Would that doubt have to be a very great one, or a reasonable one?"
4. It is for the trial Judge, at the end of the trial, to charge the jury relative to the law of "reasonable doubt," and it is not to be supposed in advance jurors will decline to heed the charge so to be given, or will refuse to be instructed by the court.
5. But in order to test the *animus* of a juror towards the accused, it may be permissible for the defense, *first explaining or having the Judge explain* the meaning of "reasonable doubt," its application to the case, and his duty to acquit should it exist, to ask the juror whether he would give the accused the benefit of such doubt.
6. Evidence of threats made by the deceased a short time prior to the killing is not admissible until foundation therefor is laid by proof of an overt act showing purpose to execute the threats.
7. It is the province of the trial Judge to decide whether the evidence submitted *pro and con* of overt act makes sufficient proof thereof to lay the foundation for the admission of testimony as to antecedent threats.
8. While his ruling in this regard is subject to review here, great reliance is placed upon his discretion and judgment in such matters—he having seen and heard the witnesses.
9. If evidence of a previous threat be not admissible because not accompanied then or afterwards by an overt, hostile act, it follows, logically, the statements constituting such threat cannot be admitted in evidence as part of the *res gestae*.
10. If other witnesses than the accused could not legally testify to alleged antecedent threats because no foundation therefor had been laid by proof of overt act, neither may the accused, himself, do so, when called to the stand as a witness in his own behalf.
11. If the accused may not give such testimony under oath on the stand as a witness in his own behalf, neither is he permitted to do so when tendered by his counsel to make before the jury an unsworn statement in his capacity *as the accused on trial*.
12. Jurors are not competent as witnesses to impeach their verdict. A court must draw its knowledge of the misconduct of jurors from some other source.

A PPEAL from the Nineteenth Judicial District, Parish of St. Martin—*Foster, J.*

Walter Guion, Attorney General, and *Anthony N. Muller*, District Attorney (*Lewis Guion*, of counsel), for Plaintiff, Appellee.

Mouton & Simon and *Broussard, Dulany & Broussard*, for Defendant, Appellant.

The opinion of the court was delivered by

BLANCHARD, J. Defendant was indicted for the murder of Gabriel Bulliard, found guilty of manslaughter and sentenced to five years at hard labor. He appeals.

Various objections are presented in support of his contention that he was not tried and convicted according to law.

Bergeron, a juror, on his *voir dire* stated, in reply to questions by counsel for defendant, he thought the man who killed Buillard ought to be punished, and that as soon as he heard of the case he formed the opinion the man who slew him ought to be punished.

He was challenged for cause by defendant. Whereupon the trial judge propounded questions to him, with the result that he replied that he had no prejudice against the accused; that as a juror he would decide the case according to the evidence as given by the witnesses on the stand and the law as expounded by the court; that no outside impression or opinion would influence him in his verdict; that he had talked to no one about the case and no one had talked to him about it; and that he had not formed or expressed any opinion as to the innocence or guilt of the accused.

It is well settled that the man who makes such answers to the court is competent to sit on the case as to which he is called as a juror. *State vs. Kellogg*, 104 La. 581. The mere expression by a citizen of a just indignation on hearing of the death by violence of another does not disqualify him from jury service in the case.

It is objectionable for the defense to ask of jurors, sworn on their *voir dire*, questions like the following:

"In a criminal prosecution, as a juror, sworn to try a case and when forming your verdict, to whom would you give the benefit of the doubt—the State or the accused?"

"If accepted on this jury, would you give the benefit of any doubt created in your mind by the evidence to the accused and acquit him?"

"Would that doubt have to be a very great one, or a reasonable one?"

The law requires the trial judge, at the end of the trial, to charge the jury that if a reasonable doubt find lodgment in their minds as to the guilt of the accused, they must give the latter the benefit of the same

and acquit, and it is not to be supposed, in advance, that the jury will decline to heed the charge so to be given, or that a juror will refuse to be instructed by the court.

In order to test the *animus* of a juror towards an accused person, it might, perhaps, be permissible for counsel for the defense, first, explaining, or having the judge explain, the meaning of "reasonable doubt," its application to the case, and his duty to acquit in case of the existence of such doubt as to guilt, to ask the juror whether he would give the accused the benefit of such doubt should it arise in his mind. But to permit him, without explanation of the meaning of "reasonable doubt," and without instruction as to his duty as a juror in respect to the same, to be asked the questions, or any one of them, noted above, would be improper, as tending to confuse and embarrass.

Another bill of exceptions presents the protest of the accused against the ruling of the judge declining to receive evidence relative to threats alleged to have been uttered by the deceased against the accused.

It appears the accused and the man he killed were rival merchants, keeping country stores. Bayou Teche separated their stores, but it had been bridged at that point. The store of the accused was at the eastern end of the bridge; that of the dead man at the western end.

The day of the homicide was Sunday. It seems that the law against opening stores on the Sabbath is enforced in that parish. The accused went to his store on that Sunday morning and opened it—not, it appears, for the purpose of selling goods, but for another purpose.

Buillard (the man killed), from his side of the bayou, saw defendant open his store and thereupon rode over the bridge on horseback up to the door of the store and inquired about the opening of the store, objecting to the same.

A wordy dispute followed, the parties became angry, vile language was used, the contention of the accused being that there and then threats were made by Buillard to the effect that when he (the accused) would, later, cross the bayou there would be another and hostile meeting between them.

Buillard then rode back to his premises across the bridge. The house of the accused appears to have been on the same side of the bayou, and in reaching it he had to cross the bridge and go past the house of Buillard.

A half hour after the conversation between the parties at the store,

the accused crossed the bridge, having first armed himself with a pistol. There is evidence to the effect that on reaching a point in the road opposite the house of Buillard he called to the latter and invited him out to the road. There is other evidence to the effect that he did not accost Buillard and invite him to the road, but that the latter, seeing the accused coming up the road, came out to the road, crossed the fence that separated his yard from the road, and got into the road ahead of the accused and between the latter and his home.

It seems that Buillard had, too, armed himself with a pistol and both parties had their weapons in hand as they confronted each other in the road.

Some words passed between them, whereupon the wife of Buillard, who had, with their son, followed her husband, begged the parties not to fight until they could get witnesses and to put off a combat until the following day, Monday—her hope being, it is said, that by that time the parties would think better of it and no fight would ensue.

She followed this up by calling to her husband to come back into the yard. He obeyed, left the road, recrossed the fence and entered the yard.

When in the yard he was fired at three times by the accused, one of the shots striking him in the *rear* of the right side, the bullet entering about three inches from the spinal column, passing straight through the stomach and making its exit towards the *front* of the left side.

The contention of the accused is that Buillard on regaining the yard, again faced him, leveled his pistol and was about to fire, when he (the accused), himself, fired.

There is testimony to support this view.

The contention of the prosecution, supported by evidence, is that this is not so, that Buillard had renounced the combat in the road, had heeded the request of his wife to return to the yard, had started for his house, and was in the act of restoring his pistol to its pocket when he was shot practically in the back.

On offering the testimony to prove threats uttered at the store a half hour before the fatal shot was fired, the contention of the accused is that Buillard, after leaving the store, went home and armed himself, waited until the accused had crossed the bridge and was upon the public road on his way home, and then intercepted him in the road with the intention and purpose of carrying the threat into execution.

The prosecution opposed the reception of the evidence on the ground

that before testimony of previous threats can be elicited, it is necessary to lay a foundation therefor by showing an overt, hostile act or demonstration on part of the deceased, at the time of the homicide, exhibiting a purpose on his part to carry the threat into execution; that previous threats will not justify the taking of human life unless there is a present intent evidenced by some overt act to execute them.

Following this objection, the court, at the request of the defense, received testimony in support of the alleged overt act, first retiring the jury.

From the testimony thus taken, the brief statement of facts heretofore given is abstracted. The evidence came up as part of the bill of exceptions.

The trial judge sustained the objection to the testimony and it was excluded.

We cannot say he erred. Whatever may have been said by Buillard at the store a half hour previous to his being shot, and whether he went out to the road of his own motion, or was invited out by the accused, and whether in going out of his own motion, or on the invitation of the accused, he had the then purpose of executing a previous threat uttered, it is evident that once in the road and facing his antagonist he thought better of it and did not shoot or attempt to shoot, but heeded the request or call of his wife and re-entered the yard, and after he was in the yard and while his back was still towards the accused, was shot. The place of entry of the ball is indubitable proof that he was shot from behind. Under the circumstances, it is impossible to conclude he was, at the moment, facing the accused and about to shoot at him.

The trial Judge, who heard the witnesses, came to the conclusion whatever overt act there may have been at one time, if any, had been abandoned, the deceased had renounced any purpose of assaulting the accused, had retired from the combat and was on his way home when the accused, himself, became the aggressor and shot and killed him. Kellogg's Case, 104 La. 192, *et seq.*

There being a wide difference between *evidence* of an overt act and *proof* of the same, it was for the Judge to decide, from the evidence offered in support of the overt act, whether a sufficient foundation had been laid for the admission of the testimony offered to prove previous threats. If the foundation had been laid, he must admit it; if not laid, he was justified in not admitting it. *Ib.* 597-599; State vs. Nash & Barnett, 46 La. Ann. 208; State vs. Harris, 45 La. Ann. 842; State vs. Ford, 37 La. Ann. 443; State vs. Frierson, 51 La. Ann. 706.

We are not prepared to say he erred in his judgment, on the evidence adduced, that it had not been laid.

Having failed to obtain the admission of testimony of previous threats made by the deceased as distinct substantive evidence, the defense offered the same or similar testimony, claiming its admissibility as part of the *res gestae*. On objection by the State it was excluded and a bill reserved.

This bill shows that while Sonnier, a witness for the defense, was testifying he was asked concerning the conversation had between Buillard and the accused at the store of the latter a half hour before the shooting of Buillard, and, especially, as to the statements then and there made by the latter to the accused, for the purpose, as announced by defendant's counsel, of establishing that the same were and formed part and parcel of the same transaction or difficulty which ended in the death of Buillard—this with the view of securing the admission of the testimony as *res gestae*.

Was it such? We hold with the trial Judge it was not. The use of rough and violent language between the parties at the store, the bandying of epithets, the declaration of Buillard, in effect, that when the accused crossed over to his side of the bayou he would meet him there and have it out with him, was not, as we have seen, followed by an overt act on part of Buillard in execution of the threat. If it had, the testimony would have been admissible on the grounds set up in the bill of exceptions we have just considered.

If the evidence were not admissible as showing a threat, because not accompanied then or afterwards by an overt act, it follows, logically, that it cannot be considered part of the *res gestae*.

Threats, unaccompanied by an overt, hostile act, do not warrant the taking of human life. If, therefore, the accused, a half hour after the threat was uttered, crossed over the bayou, found Buillard and killed him, it would be stretching the doctrine of *res gestae* very far to say that what had occurred at the store of the accused came within its grasp. It would be practically holding that the accused had the right to kill Buillard because of the threat, notwithstanding there was no further aggression or hostile act on his part.

That which is thus sought to be admitted as *res gestae* is to be viewed, rather, as something pertaining to a different and disconnected occasion or transaction.

In other words, the wordy dispute across the bayou is to be

considered another affair from the shooting which, a half hour later, resulted in the death of Buillard, and, therefore, not a part of the *res gestae*—not a thing, or act, or circumstance connected with his violent death at the hands of the accused.

The distinguishing characteristic of these things which constitute *res gestae* is that they must be necessary incidents of the criminal act, or immediate concomitants of it. Wharton Crim. Ev., Sec. 263.

We do not think the excited utterances of Buillard across the bayou stand in immediate causal relation to the subsequent act of the accused in killing him, and, hence, they are not to be considered as part of the action immediately producing the homicidal deed. *Ib.*

It has been held that no flexible rule can be formulated in determining what constitutes *res gestae*; that the facts of each case stand alone and must speak for themselves; that in each case the particular facts and incidents must be considered as an independent group, and the judge must determine whether they fall within or without the operation of the rule. *Molisse's Case*, 38 La. Ann. 383.

Conceding that Buillard had not come out into the road on the invitation of the accused, but was there of his own motion, intercepting the accused in furtherance of a purpose to do him bodily harm, yet when he desisted from that purpose, renounced the combat, retired from the scene, crossed back over the fence into his yard, he broke the connection between the threat he had earlier made at the store across the bayou and the shot of the accused which killed him. *Res gestae* consist of circumstances or declarations made admissible as original evidence by reason of their connection with the particular act under investigation, and the test is whether the fact or declaration sought to be put in evidence is so connected with the act charged against the accused as to form, in conjunction with it, one continuous transaction. 1 *Greenleaf* (14th ed.), Sec. 108, p. 161; *Donelon's Case*, 45 La. Ann. 745; *Wilson's Case*, 43 La. Ann. 841.

Having failed to secure the admission of evidence relative to antecedent threats of the deceased on the two grounds just considered, to-wit:—that of overt act following the threat, and that of *res gestae*, the accused, himself, took the stand as a witness in his own behalf and sought to testify to such threat.

Being met with the same objection that had resulted in excluding such evidence by other witnesses on the grounds referred to, his counsel took the position that the accused as a witness for himself was not to be

restricted by the ordinary rules of evidence which govern other witnesses, and, hence, while other witnesses might not testify to threats made without foundation for the same having been laid the accused could.

Being overruled as to this contention, a bill was reserved. We find no error here.

The accused was then withdrawn by his counsel from the stand *as a witness* and tendered to make an unsworn declaration *as an accused* to the jury. The declaration he would have made was as to threats against him by the deceased—the same previously ruled out.

Objection to this by the State was sustained and a bill reserved.

In support of his right to make such a declaration, we are referred to Art. 9 of the Constitution of 1898. We find nothing in this article authorizing the same.

Then follow three bills of exception embodying objections to the ruling of the judge refusing a new trial. The grounds set forth in the motion for new trial relate to alleged misconduct of the jury during their deliberations in this, to-wit:—that certain books relating to Crimes and Criminal Law having been left on the table used by the attorneys in the court-room, and the jury having had access to this room when the court was sitting, some of the jurors examined these books and read portions of them.

It was proposed to prove this by the testimony of two of the jurors, themselves, who were offered for the purpose.

The State objected and the objection was sustained on the ground that a court must derive its knowledge of the misconduct of jurors from some other source than the jurors themselves.

This ruling was correct. State vs. Nelson, 32 La. Ann. 847.

For the reasons assigned it is ordered, adjudged and decreed that the verdict, sentence and judgment appealed from be affirmed.

Rehearing refused.

(Mr. Justice MONROE dissents, being of the opinion that under the Constitution (Article 179), where, in a case such as this, there is *any* evidence tending to show the overt act relied on as the foundation for the introduction of evidence of previous threats, a question of fact bearing upon the "guilt or innocence" of the accused is presented, which should be submitted to the jury and which includes the question as to whether the previous threats were made.)

No. 13,945.

SUCCESSION OF D. W. WILLIAMS.

SYLLABUS.

1. A person without pecuniary interest in a succession is without standing to oppose the appointment of an administrator.

A PPEAL from the Civil District Court, Parish of Orleans—*Ellis, J.*

Dinkelspiel & Hart, for Gabriel Fernandez, Jr., Administrator, Appellee.

Theodore Colonio, for Opponents, Appellants.

Milton J. Cunningham, for Public Administrator, Appellee.

John N. Ogden, Counsel for Absent Heirs, Appellees.

The opinion of the court was delivered by

PROVOSTY, J. This case exhibits oppositions to the appointment of an administrator, with no other interest in the opponent than, one of them, that he is a resident of the city of New Orleans, and, the other, that he is owner of a piece of real estate inventoried as belonging to the succession, to recover which a suit will be brought against him if the administrator is appointed. It is plain that the opponents are without interest, and therefore without standing, to interfere with the management of this succession. Hen. Dig., p. 1123, No. 12; C. P. Art. 15. The opponent acquired the property of the succession at a tax sale, and now wants to block the appointment of an administrator so as to head off the bringing of a suit for the recovery of the property. In support of this proceeding he cites the decision of this court in the case of Succession of Aronstein, 51 Ann. 1052: in that case the opponent was an heir.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed, and that the opponents pay the costs of the opposition and of this appeal.

Rehearing refused.

No. 13,990.

107 611
110 440**METHODIST EPISCOPAL CHURCH, SOUTH, ETC., VS. CITY OF NEW ORLEANS.****SYLLABUS.**

1. All property is liable to taxation unless shown to be within some exemption established by law. Hence, in a proceeding to annul an assessment, the exemption relied on must be affirmatively established.
2. Property, liable to taxation, which is entered upon the assessment rolls as "exempt," and which is not assessed, is "omitted" from the assessment as effectually as if it were not entered at all, and is, therefore, within the meaning of the law providing for the assessment of property which has been "omitted."
3. Taxes for the current year are not included in the term "back taxes," as used in Section 12 of Act 170 of 1898, providing that "no back taxes for more than three years shall be assessed," hence, taxes may be assessed for three years preceding that in which the assessment is made. Nor, does it affect the question that the supplemental tax roll is not recorded or the notices of assessment given until the following year.
4. A suit, the purpose of which is to relieve property of the taxes assessed against it for one, or more, years, is a proceeding "for the reduction of assessments" within the meaning of the law providing that in such cases the attorney of the tax collector shall be compensated by receiving ten per cent. on the amount collected.

A PPEAL from the civil district court, parish of Orleans—*Théard, J.*

William S. Benedict, for plaintiff, appellee.

H. Garland Dupré, assistant city attorney, for defendant, appellant.

The opinion of the court was delivered by

MONROE, J. The plaintiff alleges that certain real estate belonging to it, to-wit: lots 6, 7, 8, 9 and 10 in square 242, bounded by Jackson, Brainard, Josephine and Carondelet streets, in the city of New Orleans, have recently been assessed for the taxes of 1895 and 1896, without authority of law, said property having been, under article 207 of the constitution, and contemporaneous jurisprudence and custom, exempt from taxation, as used for religious purposes. That said assessment was made upon a so-called "supplemental roll," made up, it is claimed, in consequence of a decision of the supreme court, which decision was,

however, rendered in a case to which petitioner was not a party, and, by its terms, exempts like property for said years. That the assessment in question is said to have been made under the authority of section 12 of act No. 170 of 1898, but that said law was not complied with, or is inapplicable, for this: that said property was not "*omitted*" from, or "*erroneously*," or "*improperly*," assessed on the regular rolls, but was entered thereon as exempt, and hence the statute relied on confers no authority on the assessors to make a new assessment, and the same should be decreed null and void. It is further alleged that the property has been assessed *in globo* under the numbers 6, 7, and 8, lots 9 and 10 not being named, though included in the measurement. The prayer is, that the board of assessors, the state tax collector, and the city of New Orleans be cited and that plaintiff have judgment annulling the assessment of which it complains.

The defendants have answered, denying generally the allegations of the petition; and the board of assessors and state tax collector pray that they be allowed attorney's fees.

There is nothing to show that the property in question is now, or has ever been, used for any purpose which would entitle it to exemption from taxation. The assessor states that it belonged to "this church association," and that it was at one time used as a parsonage, and at another as a boarding house. Being the property of a religious corporation, he had, however, entered it on the rolls as exempt, during the years in question. It is admitted that the supplemental assessment roll, for the year 1895, was filed December 29th, 1898, and recorded in the mortgage office, April 5, 1899, and it is shown that the taxes of 1897, 1898, and 1899 have been paid, upon similar assessments. There was judgment in the court *a qua* in favor of the plaintiff as to the year 1895 and against it as to the year 1896. The city of New Orleans, alone, has appealed, and the plaintiff joins it in the appeal "in so far as to complain of the judgment of the lower court in allowing the claim of the attorneys of the state tax collector for ten per cent. upon the amount of the taxes due for the year 1896, the cancellation of which had been prayed for and rejected whilst that for the year 1895, likewise embraced in the prayer, had been allowed."

Section 12 of act 170 of 1898 is identical with section 11 of act 106 of 1890, and reads as follows:

"That if any tract or lot of land or other property shall be omitted in the assessment of any year, or series of years, or in any way erro-

Church, etc., vs. City.

neously assessed, the same, when discovered, shall be assessed by the assessor or tax collector for the whole period of which the same may have been omitted or improperly assessed, and shall be subject to the state, parish and municipal taxes which have been or may hereafter be assessed against said property, in accordance with law; provided, no back taxes for more than three years shall be assessed against said property, and provided further that such assessment shall appear upon a supplemental roll and be filed in the same manner as regular tax rolls. A notice by mail shall be given of the completion of said assessment rolls and that it is exposed for examination in the office of the assessors, whether the tax is on movables or immovable property, and that ten days are allowed said parties to make to the assessor any complaint they may wish to urge against said assessment. And in the case of unknown owners notice shall be published twice, during a period of ten days, in a daily newspaper published in the city of New Orleans, and, in other parishes, as provided by section 21 of this act, and, in case of no complaint, said assessment, without any further requisite or formality of any kind, shall be final and conclusive on the parties assessed. In the event of any such complaint, the decision of the assessors thereon shall be promptly made, and shall be final; and said assessment, without any further formality or requisite of any kind shall be binding and conclusive on the parties assessed, saving, however, the parties assessed an appeal to the courts within five days from the decision of the assessors on said complaint, which decision shall be deemed notice, and said delay of five days shall begin from the day of the entry by the assessors on said supplemental roll of the words 'appeal rejected'."

Property liable to taxation which is entered upon the assessment rolls as "exempt," and which is not assessed, is "omitted in the assessments" as effectually as if it were not entered at all, and is, therefore, within the meaning of the law providing for the assessment of property which has been omitted.

As all property is liable to taxation unless it be shown to be within some exemption established by law, and as no such showing is made in this case, we must assume that the property in question was liable to taxation.

The admission, that the supplemental roll for 1895 was filed on December 29th, 1898 is conclusive as to the time of the assessment. The law provides that no "back taxes for more than three years shall be assessed," but, as was held in the "Stempel" case, taxes for the current

year are not "back taxes." State *ex rel.* Stempel vs. New Orleans *et al.*, 105 La. 768. During the whole of the year 1898, the only back taxes were those for preceding years, and it was competent for the assessors to go back as far as 1895 for the purposes of a supplemental roll. The fact that the roll was not recorded in the mortgage office and that the plaintiffs were not notified of the assessment until later does not affect the question, as the assessment had been made within the time prescribed. The question of the attorney's fees was also disposed of in the Stempel case. It was there held that the attorney representing the tax collector "in all proceedings for the reduction of assessments," etc., is entitled to "ten per cent. of the amount collected," and that a proceeding the purpose of which is to relieve the property from liability for taxes for certain years is an action for the "reduction of assessment." Neither the tax collector nor his attorney are complaining, however, and no change will be made in the judgment, from which the city, alone, has appealed, as to the matter of attorney's fees. The only remaining question relates to the description of the property. It is sufficient for the purposes of identification and the plaintiff has since then paid the taxes for several years based upon a similar description. The case, upon the whole, is with the appellant.

It is, therefore, ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed in so far as it directs the cancellation of the assessment of the property in question for the purposes of city taxation for the year 1895, and in all other respects that said judgment be affirmed, the plaintiff to pay all the costs.

Rehearing refused.

107 614
110 408

No. 14,213.

MRS. ADELE C. GUILLEBERT, WIFE, ETC., VS. MRS. MARIE J. GRENIER,
WIFE, ETC.

SYLLABUS.

The minor's marriage without the consent of her tutrix, although in every respect legal, did not have the effect of emancipating her from the disabilities of minority. The mother's kindness to her daughter and her son-in-law after the marriage, which has no appearance of any intention to condone the fact that her consent had not been sought or obtained, does not have the effect of supplying the want of consent of the mother and tutrix.

Guillebert vs. Grenier.

Jurisprudence of this State, and of other States, of this country as well as for eign, has always attached importance to the consent which minors should obtain before their marriage.

The court deals only with the question growing out of the failure of the minor to obtain the tutrix's consent before marriage. Other issues are not brought before the court by the record so as to justify it to pass upon them.

The minor has not been emancipated and could not compel an accounting as asked by her.

A PPEAL from the Fourteenth Judicial District, Parish of Avoyelles—*Couvillon, J.*

Adolph Vallery Coco, for Plaintiff, Appellant.

A. J. Lafargue, H. C. Edwards and William Hall, for Defendants, Appellees.

The opinion of the court was delivered by

BREAUX, J. Plaintiff, a minor, averring that she is emancipated by marriage, sued her mother and tutrix for an account of tutorship.

Plaintiff was one of the pupils of a female college at West Point, Mississippi, and at the closing exercises of the session in May, 1901, she says that she informed her mother, her mother being with her, that she and Dr. Barbin were engaged to be married and that her intention was to marry during the summer following. A few months afterward, they, plaintiff and Dr. Barbin, went to Port Gibson, where they were married without her mother's consent.

We gather from the testimony that the only objection of the mother to the marriage was that her daughter was too young. Plaintiff returned the day after her marriage and was shortly after met by her mother, who treated her daughter kindly, and showed no ill-feeling to her son-in-law.

Plaintiff's contention is that she is emancipated by her marriage, and further that her mother has condoned her asserted disobedience in marrying without her consent, and that, besides, her mother has lost the right of tutorship by contracting a second marriage in 1885, by reason of the fact that her second husband, the step-father of plaintiff, did not comply with the provisions of Article 255 of the Civil Code in so far as that article requires the inscription of the minor's mortgage.

To this action, defendants presented an exception of no cause of action, in which they alleged that plaintiff had eloped with Dr. Barbin

and was married as before stated; that plaintiff being a minor under the age of eighteen, her marriage without the consent of her tutrix did not have the effect of emancipating her nor of releasing her from any of the disabilities which attend minority.

The evidence substantially proves the foregoing statement of facts.

The judge of the District Court sustained the exception and dismissed the plaintiff's action. Defendant filed an answer to the appeal, and asks that damages be allowed her against the defendant for having uselessly appealed upon grounds that are frivolous.

The question is whether by marriage solemnized in another State, without the consent of the tutrix, plaintiff has all the rights to which an emancipated minor is entitled. While the marriage is entirely good and valid, a negative answer, none the less, suggests itself as relates to emancipation.

By the clear and concise provisions of the text of the law the minor does not, by the marriage, without the consent of her tutrix, acquire the right of compelling her to account before majority for the property in her possession for the minor.

In an early case, a minor, aged nineteen, having failed to obtain a decree of emancipation from the court, sought to be relieved from the disability attending minority by going to Mobile, and there marrying without the knowledge or consent of his tutor. Upon his return to this State, he sued his tutor for his property. He was met by the answer that his marriage, under the circumstances just mentioned, did not emancipate him and that he would have no right to an accounting by the tutor until his majority. The District Court gave him judgment. On appeal it was reversed, and this court held that his marriage, in violation of law, did not have the effect of emancipating him. *Maillefer vs. Sallet*, 4 Ann. 375.

Another minor who had lost both father and mother, repaired to another State with the one to whom she was afterward married and they were married. On their return to Louisiana, they sought by suit to get property held jointly with her co-heirs. The court affirmed the decision cited *supra* and said: "We are satisfied with the decision in the case of *Maillefer vs. Sallet*, and as the marriage in Mississippi did not have the effect of emancipating the minor, it is clear that she was not authorized to bring this suit," and they dismissed her suit. *Babin and Husband vs. LeBlanc*, 12 Ann. 367.

The question afterward came up incidentally in another decision in

which this court availed itself of the opportunity to say that the minor, although legally married, was not duly emancipated for the reason that the marriage had been contracted in another State without the tutor's consent and in evasion of her laws. *Clement vs. Wafer*, 12 Ann. 602.

It is not the intention to discriminate against marriages solemnized in other States. If it had been solemnized in this State the disability, as relates to emancipation, would have been the same. No greater effect can be given to the marriages certified to by authorities in another State. In nearly all the States of the Union the law requires the consent of the parents or other legal representative before the license is issued. *American and English Encyclopædia of Law*, Vol. 19, p. 1191, 2nd edition.

To sustain the defense of emancipation by marriage not preceded by consent would hold out encouragement to minors indifferent to parental influence and control to go counter to their proper authority. It would offer inducements to youths to enter into improvident and ill-advised marriages which maturer years would cause them to regret or deplore.

In foreign jurisdictions, under the civil law, the restraint is even greater.

"There are decisive reasons in the interest of the children opposed to their contracting marriage without the consent of their parents. While they are minors the law should have forbidden their marriages, as they are incapable of performing ordinary acts of life. They are without authority to dispose of the least portion of their property, how can they properly see to their liberty, to their future? If the law permits the marriage of minors, it can only be in the interest of morality, but while the law may declare that marriage may be contracted at the age of fifteen or eighteen years, it is none the less true that children of that age are incapable of understanding the gravity of the engagements they contract. It has, however, become necessary to find something toward avoiding the incapacity. This is the purpose of the "consent" they are ordered to obtain from their parents until they have reached the age of majority." The foregoing is translated from *Laurent*, Vol. 2, p. 418.

We have dealt exclusively with the subject of consent which should precede the marriage in order that the marriage may emancipate the minor. We have naught to do with questions that might arise if there was danger that the minor's property will be squandered by those upon whom it devolves to take care of it and deliver it to their ward.

That question is not before us. Nor is the obligation of the tutor to the income and, so far as is necessary, the capital under legal restrictions to the maintenance of the ward. Nor is the obligation of the tutor to apply the income and so far as is necessary the capital under legal restrictions to the maintenance of his ward, before us for consideration. A duty then arises regarding which there is no necessity of expressing an opinion at this time. In the condition of the record as made us we do not consider that the issue regarding the asserted failure of the co-tutor to qualify is before us for decision.

We do not think that defendant has given her approval to the marriage to the extent that it must now be held that the minor is emancipated. On the return of the daughter, the mother, we take it, acted as if not recalling that there had been any trouble or any failure on the part of the daughter to obtain her consent; there was no sensational scene. We understand that the daughter was kindly received and the son-in-law properly treated. This is to the credit of all parties, but it does not supply the lack of consent which should have been obtained prior to the marriage as a condition of emancipation. Moreover, the inference is that the defendant did not intend to ratify. "In cases of doubt in matter of ratification the one to whom the act is opposed must have the benefit of it." Succession of Easom, 49 Ann. 1348.

We have noted in our statement of the pleadings that defendant seeks damages for a frivolous appeal. This appeal presents none of the features which would warrant damages.

For reasons assigned, the law and the evidence being with the defendant, the judgment in her favor is affirmed.

NICHOLLS, C. J., dissents, for reasons assigned in a separate opinion.

No. 14,207.

STATE OF LOUISIANA VS. MITCHELL AND DAN YOUNG.

SYLLABUS.

1. Where, as part of his exculpatory evidence, an accused person seeks to prove admissions (not part of the *res gestae*) made by another person to the effect that it was he, and not the accused, who killed the deceased, objection to the evidence that it is hearsay was well taken.
2. Where the avowed object of alleged newly-discovered evidence is to discredit a prosecuting witness, the general rule is a new trial will not be granted.

A PPEAL from the Sixth Judicial District, Parish of Ouachita—
Hall, J.

Walter Guion, Attorney General, and *James P. Madison*, District Attorney (*William Francis Millsaps* and *Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Hudson, Potts & Bernstein, for Defendant, Appellant.

The opinion of the court was delivered by

BLANCHARD, J. The accused were indicted for the murder of Perry Cook and convicted by a jury of manslaughter.

From a sentence of three years in the penitentiary at hard labor, they appeal.

The first bill of exceptions brings to our attention that:—

After evidence had been received that shortly after the homicide, one Jim Bullard was arrested on a warrant issued by direction of the coroner's jury, charged with the murder of Perry Cook, and after evidence had been received * * * of several witnesses, sworn for the defendants, that Jim Bullard and one Joe Glover, on the date and at the time and place charged in the indictment, had shot Perry Cook, and that defendants in the case had not fired a shot * * *, defendants offered to prove by Byron Parker, Justice of the Peace in the ward of the parish where the homicide was committed, and by E. R. Guyton, a prominent citizen in the neighborhood, and by several other witnesses, that shortly after the commission of the homicide, and on the day the inquest was held, said Joe Glover confessed and admitted that he shot Perry Cook and was the man who killed him.

This evidence was objected to on behalf of the State on the ground that the same was hearsay, which objection the court sustained and excluded the testimony.

There was no error in this ruling.

In the 3rd volume of *Rice on Evidence (Criminal)*, p. 136, Sec. 87, on the subject of hearsay evidence, that author declares that where, as a part of the exculpatory evidence, it is sought to prove admission made by absent parties tending to show that they themselves were guilty of the crime and not the person on trial, such testimony is unquestionably incompetent.

And Mr. Wharton, in his work on *Criminal Evidence*, 9th ed., p. 176, Sec. 225, says:—

On an indictment for murder, the admissions of other persons that they killed the deceased, or committed the crime in controversy, are not evidence—

citing *Greenfield vs. People*, 85 N. Y. 75; *Smith vs. State*, 9 Ala. 990; *Snow vs. State*, 54 Ala. 136; 58 Ala. 372; *Sharp vs. State*, 6 Tex. Ap. 650; *Holt vs. State*, 9 Tex. Ap. 571.

See also *United States vs. Munholland*, 50 Fed. Rep. 417; *Daniel vs. State*, 65 Ga. 200; *Brown vs. State*, 3 Tex. Ap. 623; *Pick vs. State*, 36 Tenn. 267 (6 S. W. Rep. 389); *Rhea vs. State*, 10 Yerg. 258; *Corn vs. Chabcock*, 1 Mass. 144; *State vs. White*, 68 N. C. 158; and *State vs. West*, 45 La. Ann. 17.

The second bill of exceptions is leveled at the refusal of the trial Judge to grant a new trial upon the ground of newly discovered evidence.

The averment was that on another trial the accused would be able to prove by two witnesses, who are named (one of them the Justice of the Peace hereinbefore mentioned), that four days after the homicide the parties referred to interviewed John Warren, one of the chief witnesses for the State, who had testified to statements made to him by the accused, immediately after the shooting of the deceased, to the effect that one of them had shot him and the other had struck him "a lick that he will not get over for seventy-five years," and that said Warren denied to them having any knowledge whatever of the guilty parties, or any information as to the manner and cause of the death of Cook; that he had not the least idea who shot Cook and had never heard who shot him; that all he had heard was one John Glover telling his sons, Joe and James Glover, "no one must know anything about who shot Cook," that he (Warren) had talked with a good many persons who were present and near by when the deceased was shot and killed, and that all of them stated to him they did not know who did the shooting.

The bill recites that this evidence and these facts were unknown to them, or their counsel, until too late to be used on the trial, and were only discovered after defendant's evidence had been closed and after said Warren had testified and been dismissed as a witness from the case.

It is further recited that after learning the facts—the trial of the case not having yet ended—they called the said Parker to the stand and offered him as a witness to prove the facts averred, but the evidence was objected to by the State on the ground that no proper foundation had been laid for contradicting the witness Warren, and this objection was sustained.

With reference to the exclusion of this testimony, the Judge gives as reason for his ruling that during the examination of the State's witness Warren, and indeed throughout the trial, Byron Parker and E. R. Guyton (one of the other witnesses referred to by the defendants in

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their motion for new trial) sat with the defendants and their attorneys and displayed some interest in behalf of the defendants by frequent consultation with their attorneys.

He further states that notwithstanding it was evident, from the attempt made, to impeach the testimony of the witness Warren and from the questions propounded to Parker for the purpose, that the evidence had been discovered before Parker was placed on the stand, no effort was made to have Warren recalled for further cross-examination in order to lay the proper foundation for contradicting him.

Under these circumstances we hold the Judge ruled correctly in excluding the testimony.

The proper course for the accused to have pursued was to have had the witness Warren recalled for further cross-examination and then have asked him the questions which would have laid the foundation for impeaching him.

Besides, it is well settled that where the avowed object of alleged newly discovered evidence is to discredit a witness who had testified on the other side during the trial, the general rule is a new trial will not be granted.

State vs. Young and Barbo, 34 La. Ann. 346; State vs. Fahey, 35 La. Ann. 12; Wharton on Crim. Law, Vol. 3, Sec. 3354; State vs. Disken, 35 La. Ann. 48; State vs. Williams, 38 La. Ann. 361; State vs. Gauthreaux, 38 La. Ann. 608.

Judgment affirmed.

Rehearing refused.

No. 14,138.

THE GLOBE LUMBER COMPANY, LIMITED, vs. B. T. GRIFFETH, SHERIFF,
ET ALS.

SYLLABUS.

1. Where a bond for suspensive appeal is filed after the delay fixed by Act No. 163 of 1898 it is a matter of no interest to the party applying for the appeal whether the act is unconstitutional or not, since in such case, the delay fixed by Article 117 of the Constitution, which article is self-operative, must have expired.
2. Where an execution is enjoined on a sworn allegation that timber worth a certain amount has been seized and an order is made dissolving such injunction.

tion on a bond for a like amount, the injury which may result from such dissolution sounds in dollars and cents is not irreparable, and no appeal lies.

A PPEAL from the second judicial district, parish of Webster.—
Watkins, J.

Stewart & Stewart, for plaintiffs, Appellants.

J. Henry Sheperd, and *Lynn K. Watkins*, for defendants, appellees.

The opinion of the court was delivered by

MONROE, J. The plaintiff alleges that the judge *a quo* has fixed the regular term for his court in the parishes of Webster and Bossier, and that the last term in the parish of Webster began June 3rd and ended June 22nd, 1901; that during said term, a judgment was rendered against it (plaintiff) from which it obtained orders of appeal, both suspensive and devolutive, which were signed June 21st, and that on June 26th, it filed a bond for suspensive appeal, and that the district court was thereby divested of jurisdiction of said cause, and that all proceedings therein should be stayed. It further alleges that the clerk of the district court, upon July 27th, nevertheless, issued a writ of *feri facias* in said cause, and that the sheriff has thereunder seized certain timber belonging to the petitioner, worth \$11,000, and will sell the same unless restrained by injunction. It further alleges that the suspensive appeal was taken by it in due time and that the Act No. 163 of 1898 is unconstitutional, in that it seeks to regulate the right of appeal and other matters not mentioned in the title, and that the said writ of *feri facias* was improvidently issued and is unauthorized by law. It further alleges that, after the appeal mentioned had been taken, Chas. R. Bell, the plaintiff in the judgment appealed from, died, and that Lillian Bell is seeking to have said judgment executed in her favor, but that she is without right or authority so to do, and that the *ex parte* proceedings whereby she seeks to be made party plaintiff are illegal and unauthorized. It further alleges that if the sheriff is allowed to execute said writ, it will sustain irreparable injury and will be divested of its property without hope of recovering same; and it prays for an injunction, and for judgment, etc. Upon this petition, and upon the plaintiff's giving bond in the sum of \$11,000, a preliminary injunction issued, as prayed for. Thereafter, Mrs. Lillian Bell,

Lumber Co. vs. Sheriff.

appearing as widow of Chas. R. Bell and as natural tutrix of the minor children of the marriage, presented a petition to the district court alleging that, in the suit of said Chas. R. Bell against the Globe Lumber Company, Limited, judgment had been rendered for plaintiff and signed June 10, 1901, and that said judgment became executory ten days, not including Sunday, after it was signed; that the plaintiff, Chas. R. Bell, subsequently died, and that she, the petitioner, had been recognized as his widow and as the natural tutrix of his minor children, sent into possession of his estate, including said judgment, and made party to the suit by order of court.

She further sets forth the facts, of the seizure and of the injunction, and, alleging that no irreparable injury will result therefrom to the plaintiff in injunction, prays that said injunction be dissolved on her giving bond. To this application the plaintiff in injunction filed an answer, and, after hearing, the judge *a quo* ordered that the injunction be dissolved upon a bond of \$11,000. And from this order, or interlocutory judgment, the plaintiff in injunction was allowed a suspensive appeal, which the appellees now moves to dismiss, on the ground that no irreparable injury could result to the plaintiff from the dissolution of the injunction on bond and, hence, that no appeal lies.

If the plaintiff herein had obtained and perfected a suspensive appeal from the judgment rendered against it, within the delay allowed by law, the issuance of the writ of *feri facias* would have been unauthorized, and its execution would have amounted to trespass, since the execution of a judgment when such execution is suspended by appeal is legally impossible. In the situation as thus stated, to dissolve, on bond, the injunction restraining the execution, would be to permit the plaintiff in injunction to commit trespass on giving bond, which is also legally impossible, and there can be no doubt that, in such a case, an appeal would lie. We take it, however (although the facts are not as fully set forth as they should have been), that the plaintiff herein failed to file its bond of appeal from the judgment which had been rendered against it until after the expiration of the delay for suspensive appeal as fixed by act 163 of 1898, and that it attacks the constitutionality of that act in order to bring the matter of the delay under the dominion of the pre-existing law. But the learned counsel have, apparently, overlooked the fact that the delay is also fixed by article 117 of the constitution, itself, which article is self-operative (*State vs. Caldwell et als.*, 50 Ann. 666); so that, whether the act of 1898 is consti-

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tutional or not cannot affect the question. The other grounds upon which the plaintiff predicates its right of appeal from the order dissolving its injunction on bond are equally without merit. The injunction issued upon its sworn allegation that lumber, a mere article of merchandise, to the value of \$11,000 had been seized under execution, and, after hearing, an order was made that the injunction so issued should be dissolved on a bond of \$11,000, to be furnished by the defendant in the writ. This being the case, the bond, for its value, would have replaced the lumber, and the damage resulting from the wrongful seizure, if wrongful it was, could have been made good by resort thereto. *Crescent City Live Stock Landing and Slaughter House Co. vs. Police Jury*, 32 Ann. 1192; *State ex rel. Oil Mills Co. vs. Judge et als.*, 50 Ann. 266. In the case last above cited, this court, in referring to the position of the district court in the matter of the issuance of the writ of injunction and its dissolution on bond, said: "The district court is necessarily called upon to decide, primarily, both upon the right of the defendants to have the injunction bonded, and that of the plaintiff in injunction, after the injunction should have been ordered to be dissolved, to be granted a suspensive appeal from such order. A refusal to grant the suspensive appeal would be the logical outcome of an order to bond, for the latter order would have necessarily been based upon conclusions irreconcilable with a right to the appeal asked."

For these reasons, it is ordered, adjudged, and decreed, that this appeal be dismissed at the cost of the appellant.

Rehearing refused.

No. 14,341.

STATE OF LOUISIANA VS. BENJAMIN FAIRFAX, JR.

SYLLABUS.

1. Until an accused has had the benefit of compulsory process for securing the attendance of his witnesses he cannot be forced to trial; not even on the offer of the prosecution to admit that the witness if present would testify as it is claimed that he would.
2. An accused has not had such benefit when the witness has not appeared and the sheriff has made no return, and it is not known whether a summons timely placed in his hands has been served or not.
3. An order for the attendance of a witness from a neighboring parish stands good until revoked, or until to the knowledge of the accused such witness has

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removed from such parish; and such order need not be renewed at the succeeding term, or terms, of court when the case has gone over.

A PPEAL from the Sixteenth Judicial District, Parish of St. Landry
—*Lewis, J.*

Walter Guion, Attorney General, and R. Lee Garland, District Attorney, (Lewis Guion, of Counsel), for Plaintiff, Appellee.

Gilbert L. Dupré, for Defendant, Appellant.

The opinion of the court was delivered by

PROVOSTY, J. The case of defendant—on a charge of shooting with a dangerous weapon with intent to murder—having been fixed for trial at the October term of court, defendant made application for and obtained regularly an order for the summoning of a witness from a neighboring parish; the witness appeared, but the case went over to the February term. At the latter term a summons was issued for the witness, and was put in the hands of the sheriff of the neighboring parish for service, all in time; but when the case was called for trial the witness had not appeared, and it was found that the sheriff had not made any return, and that it could not be known whether he had served the summons or not. The defendant asked for a postponement of the trial until it could be ascertained whether or not any effort had been made to serve the summons; in other words, whether or not he had had the benefit of the right of “compulsory process for obtaining witnesses in his favor,” secured to him by the Constitution. Instead of granting this motion the court compelled the defendant to have recourse to a regular application for a continuance on the ground of the absence of the witness. The defendant made the application, but renewed in it his objection to going to trial without having had the benefit of compulsory process for the attendance of his witness. The court ruled the defendant to trial, on the admission by the prosecution that the witness if present would testify as stated in the affidavit for continuance.

To this ruling defendant reserved a bill of exceptions in which the judge gives his reasons, as follows:

“That the application for compulsory process was not timely invoked in this, it should have been renewed at the present term of court.

“And, secondly, that the District Attorney offered to admit and did admit that if the absent witness was present he would swear as stated

in the application for a continuance, which testimony was read to the jury by accused's counsel after his application for a continuance had been applied for and overruled."

We think the trial should have been postponed until reliable information had been secured as to whether the defendant had had or not the benefit of his constitutional right of compulsory process for obtaining the attendance of witnesses. The Constitution intends an honest effort shall be made to serve the summons, and that the witness shall be compelled to attend unless he has a good reason for not doing so. It is needless to inquire here whether reasonable rules may not be prescribed by the Legislature or by courts for regulating the exercise of this right, since defendant makes no contest in that regard, but insists that he has complied with these rules.

In the case of *State vs. Boitreaux*, 31 Ann. 188, this court said:

"When to procure the attendance of his witnesses the defendant has, in proper time, ordered *subpoenas* to issue, he cannot be compelled to apply for attachments, swear to the facts that he intends to prove by them or to go to trial in their absence, until an earnest and fruitless attempt has been made to bring them into court."

And again in the case of *State vs. Adam*, 40 Ann. 745, this court said:

"The constitutional guarantee to an accused of a right of compulsory process for the attendance of his witnesses is not to be trifled with. It is not a dead letter and must be enforced."

This was a case very similar to the one at bar, in that the subpoena had gone to the sheriff of the neighboring parish, and no return had been made, so that it was not known whether the *subpoena* had or not been served. The court said: "The accused was entitled to know of such return, and in the absence thereof could not be driven to trial."

See also the case of *State vs. Thomas*, 40 Ann. 154, where the court emphasizes the necessity of affording to an accused facilities for producing all the testimony which the nature of his case may admit of.

It was not necessary for defendant to make a new affidavit and obtain a new order for entitling himself to the compulsory attendance of the witness. The requiring of this affidavit and order is in the interest of the witness and of economy, as a check upon the unnecessary bringing of witnesses from a distance at great inconvenience to the witness and expense to the public; and this consideration is fully met by one affidavit and one order. The statute does not prescribe

that the affidavit and order shall be made at the term of court, but that they shall be made in anticipation of the term of court. It reads, as follows:

"In all criminal prosecutions in which the punishment may be death or imprisonment at hard labor in the penitentiary, witnesses may be compelled to attend the sessions of court from any parish of the State, if the prosecuting attorney or any citizen or accused shall state on oath what it is expected to prove by said witness, and the judge or court *in vacation*, upon examination of the case and affidavit, shall in his discretion determine whether the attendance of the witness is indispensable to the trial and for that purpose the court before which a prosecution is pending may cause to be issued subpoenas and attachments to its officers as the case may require." Rev. Stat., Sec. 1036.

This statute says that the order may be obtained in vacation. This means at some time before the commencement of the term of court. What length of time before the term of court is not specified. We can see no good reason why an order made in October, should not hold good until the following February, in the absence of proof that the witness has changed his domicile, or that the judge has had reason to change his opinion in regard to the indispensability of the witness. The essential thing is that there shall be an order. Such order when once made ought to hold good until revoked.

How far the admission as to what the witness if present would testify to, may be made to stand as a substitute for the compulsory attendance of the witness, is a question which under special circumstances may present serious difficulty, but which cannot arise in this case, when, so far as appears, no effort whatever was made by the sheriff to secure the attendance of the witness; in such a case the defendant, if ruled to trial over objection, is clearly deprived of his constitutional right. As a matter of course, Act 84 of 1894 was not intended to operate as a nullification of this right to the compulsory attendance of witnesses. To give it such a construction would place it in direct conflict with the Constitution. *State vs. Berkly*, 92 Mo. 41; 4 S. W. R. 24.

It is, therefore, ordered, adjudged and decreed that the verdict and sentence in this case be set aside and that the case be remanded to the lower court to be proceeded with according to law.

No. 14,229.

MRS. MARIE MELANCON, WIFE OF CAMPER WILSON, vs. CAMPER WILSON,
HER HUSBAND.

1. The fact that the defendant, against whom a decree of separation from bed and board has been rendered, which is still subject to devolutive appeal, makes the objection that the judgment is final and that an action brought by the plaintiff for the partition of the community presents new matter and should be filed and docketed as a separate suit, does not amount to an acquiescence in the judgment of separation from bed and board and does not cut off the right of appeal therefrom.
2. Whilst it is true that a moneyed demand, coupled with a demand for separation from bed and board, may be incidental thereto, and may be carried with it for the purposes of jurisdiction, and whilst it is true that the appellate jurisdiction of this court extends to suits for separation from bed and board and for divorce "and to all matters arising therein," it does not follow that such jurisdiction extends to a suit, brought after a judgment of separation from bed and board has become final, for the partition of community property valued at less than \$2000, when it appears that there was no demand for such partition in the suit in which such judgment was rendered and that no question of partition was raised on the trial, or passed on in the said judgment. *Nou constat* but that the parties might intend to pretermitt the partition indefinitely and transmit it to their heirs.

A PPEAL from the Civil District Court, Parish of Orleans.—
King, J.

Gustave V. Soniat, for Plaintiff, Appellee.

W. R. Kerr and *E. C. Kelly*, for Defendant, Appellant.

MR. JUSTICE BREAUX, dissenting, handed down a separate opinion.

ON MOTIONS TO DISMISS APPEALS.

STATEMENT.

The opinion of the court was delivered by

MONROE, J. In the original petition filed in this case, the plaintiff prayed for judgment of separation from bed and board, for her interest in the community, and for the restitution of \$200 of paraphernal funds, and she asked for an allowance of \$25.00 a month as alimony, for an inventory of the property of the community and for an injunction restraining her husband from disposing of the same and from molest-

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ing her, and the injunction was issued, and the inventory ordered to be taken as prayed for. The defendant, by way of reconvention, also prayed for judgment of separation from bed and board, and for a settlement of the community. The inventory as taken showed community property to the value of \$1664.00. There was judgment, in January, 1901, in favor of the plaintiff, on the main demand, and awarding her one-half of the property of the community, subject to the payment of its debts, rejecting her demand as to the \$200 claimed, and condemning the defendant for costs. In March, following, plaintiff filed a petition, under the title and number of the original suit, for a partition of the property of the community, to which the defendant excepted, that a final judgment had already been rendered which terminated the original suit and that the action for partition, constituting new matter, should have been brought as a separate proceeding; and, reserving the benefit of the exception, he answered, admitting that a final judgment had been rendered decreeing a separation from bed and board and a dissolution of the community, but especially denying that such judgment effected a partition of the property, and alleging that it left the plaintiff and himself joint owners thereof; and the answer otherwise denied the allegations of the petition, and set up certain matters of defense. No action appears to have been taken on the exception, and, in June, 1901, there was judgment for plaintiff, decreeing a partition and ordering a sale to effect the same; holding that five-sixths of the real estate belonged to the community and one-sixth to the husband; and further as follows: "Decreeing said plaintiff to be entitled to one-half of all the immovables, including improvements to real estate, which the court finds to be \$454.00, one-half of this belongs to said plaintiff, to-wit, \$227.00." And the judgment further fixed the fee of the notary and appraisers and taxed the costs to the mass. In August, following, the plaintiff caused execution to issue on this judgment, for \$227.00, and for \$19.45 as costs, whereupon, the defendant enjoined, on the ground, that the partition which had been decreed had not been effected and that the judgment had been incorrectly interpreted and did not authorize the execution as issued. The defendant in injunction filed an exception to this petition and also moved to dissolve the injunction, and the exception and motion were maintained and the injunction was dissolved and the suit dismissed by a judgment rendered October 21st, and signed October 25th, 1901. Thereafter, on November 6th, the plaintiff in injunction appealed, suspensively, from

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the judgment dismissing the injunction suit, and, devolutively, from the judgment decreeing the partition and condemning him for the two items of \$227.00 and \$19.45, the suspensive appeal being made returnable on the third Monday of November and the devolutive appeal on the first Monday of December. Both appeals were brought up in one transcript, which was filed, for the one appeal, November 20th, and for the other, December 5th. The only citation which we find, however, relates to the appeal returnable December 5th. The plaintiff moves to dismiss these appeals, on the ground, among others, that this court is without jurisdiction *ratione materiae*.

After these proceedings had been taken, the defendant, upon December 9th, took a devolutive appeal from the judgment of separation from bed and board, and obtained, from this court, an order, made "without prejudice," and subsequently rescinded, to consolidate it with the appeals already filed; and the appellee moves to dismiss said appeal, on the ground that the judgment appealed from has been acquiesced in and that the appeal is taken only for the purpose of sustaining the appeals previously taken.

OPINION.

Considering the motion last above mentioned; the defendant, undoubtedly, had the right to appeal, at any time within twelve months, from the judgment obtained by his wife decreeing a separation from bed and board, and we are of opinion that the facts disclosed by the record do not warrant us in holding that he deprived himself of that right by acquiescence, the more particularly as, in view of the settled policy of our law, the courts of this state will not lend their aid to the dissolution of marriages by the consent or acquiescence of the parties. The most that can be said as to the attitude of the defendant is, that he contended in the district court that the suit for separation from bed and board and for the dissolution of the community was a distinct affair from the suit, which followed, for the partition of the community property, and that, the judgment in the former suit having become final, in the district court, the suit for partition should have been filed and docketed as a separate proceeding. This does not amount to an acquiescence in the judgment decreeing the separation from bed and board, and whatever may have been the defendant's views, at that time, and whatever may be his motive now, he did not thereby lose his right to appeal from that judgment, and his appeal must, therefore, be sustained.

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Considering the motion to dismiss the appeal taken from the judgment decreeing the partition; the objection that this court is without jurisdiction *ratione materiae* is predicated upon the fact that the property of the community which was the subject of the partition is valued at but \$1664.00, and it is said that, *quoad* this proceeding, the jurisdiction is determined by the amount in dispute, or the fund to be distributed, since the questions arising in the original suit related only to the separation from bed and board and the dissolution of the community. This seems to us to be a serious objection. The appellate jurisdiction of this court extends "to suits for divorce and separation from bed and board, and to all matters arising *therein*." Constitution, Article 85. In the suit brought by the plaintiff she prayed for a decree of separation from bed and board; that an inventory be taken of the property in the possession of the husband, that he be enjoined from disposing of the same and from molesting her; that she be allowed alimony; and that she be allowed to recover all such rights and interests in and to the property standing in the name of the said Camper Wilson, or the community, as she might be entitled to. And the judgment rendered conformed, in the main, to the prayer of the petition; that is to say, it decreed the separation from bed and board, and decreed the plaintiff entitled to one-half of the community property after the payment of the debts, rejecting a claim for \$200.00 set up in the petition but not specifically referred to in the prayer, and condemned the defendant to pay the costs. The question of the partition of the community property was not raised by the pleadings, did not arise in the course of the trial, and was not passed on in the judgment. It would be quite possible, that, in such a case, the parties litigant, having had their respective interests in particular property thus ascertained and fixed by judicial decree, might elect to hold such property in common for an indefinite period. As there is no law which compels co-owners to hold property in common, so, there is no law which compels them to effect a partition, and it is evident that the question of the partition of the community property does not, of necessity, arise in the suit for separation from bed and board, or divorce, merely because, in such a suit, the question of the dissolution of the community is involved. It was held by this court in the case of *DeLesdernier vs. Same*, 45 Ann. 1365, that, where, in a suit for separation from bed and board, there was also a prayer for a monied judgment "the action was an entirety" in which the principal demand was for the separation

from bed and board whilst the demand for the monied judgment was incidental, and that the latter was carried by the former, as, in a petitory action, the demand for fruits and revenues is carried by the demand for the property. But, in the case at bar, the demand for the partition was not made in the suit for separation from bed and board and no question of partition arose in that suit. It was deliberately pretermitted, and was made the subject of a separate litigation, and it might have been pretermitted during the lives of the parties interested, and transmitted to their heirs. As the matter stands, it is now brought to this court, not as having arisen in the suit for separation from bed and board, but as having arisen by reason of a suit filed three months after the judgment decreeing the separation from bed and board had been signed by the district judge. Under these circumstances, we are of opinion that the appellate jurisdiction of this court depends upon the value of the property which is the subject of the partition, and, as that is shown to be less than \$2000, that the motion to dismiss must prevail.

The same reasoning necessarily applies to the appeal from the judgment dissolving the injunction sued out by the defendant and dismissing the suit brought by him to restrain the execution of the judgment rendered in the action for partition, and the same ruling must be made.

It is, therefore, ordered, adjudged and decreed, that the motion to dismiss the appeal taken from the judgment decreeing the separation from bed and board be denied, and that the motions to dismiss the appeals from the judgments decreeing the partition and dismissing the injunction suit, respectively, be sustained, and that said appeals be, accordingly, dismissed.

Rehearing refused.

BREAUX, J., dissents.

No. 14,263.

STATE OF LOUISIANA EX REL. P. J. MCMAHON VS. THE CITY OF NEW ORLEANS.

SYLLABUS.

1. In the absence of either express grant, or of express or implied limitation, of authority, a municipal corporation, as ordinarily constituted, possesses the incidental power, *for cause*, to remove corporate officers, whether elected by

it or by the people. If an officer has no franchise in his office—that is to say, if the nature of his office is a mere employment, he may be removed without notice, subject to the liability of the corporation for damages for breach of contract, if, by such removal, a contract is violated. But, where there is a franchise in the office, resulting from an election, or appointment, for a term fixed by law, there must be a charge against the officer to be removed, stated with substantial certainty; notice must be given of the time and place fixed for the hearing; reasonable opportunity must be afforded to defend, in person or by counsel; and, where the charge is insufficient, if proved, to justify the motion, or where, being sufficient, there is no evidence to sustain it, the officer is entitled to a *mandamus* to restore him.

2. The rule as thus stated is subject to the exception, that notice may be dispensed with, (1) when the officer appears and answers, (2) when he has permanently left the municipality, (3) in certain cases where it is apparent that the motion was for good cause and that the order to restore would be without practical and useful effect.
3. The power of motion conferred upon the city of New Orleans by section 12 of its charter is neither greater nor less than the city would have had if that instrument had been silent upon the subject, the effect of the grant, as contained in the charter, being merely to set at rest any doubt which might have existed if the matter had been left to implication.
4. The authority conferred upon the council to "expel one of its members by a two-thirds vote of all the members elected to such council, five days' notice and an opportunity of being heard in his defense having previously been given such member," presupposes a charge sufficiently grave to justify expulsion. for the hearing of which time and place are fixed; for, if there be no such charge and no time and place fixed for the hearing there can be no defense and nothing of which to give notice.
5. Whether the charge is sufficient, if proved, is for the ultimate determination of the courts; but, where the notice and the opportunity to defend have been given, and evidence has been adduced in support of the charge, the courts will not, ordinarily, go behind the judgment for the purpose of inquiring "into the amount or the balance of evidence."
6. A statement, made in confidence by a member of the New Orleans city council to the mayor that he had heard rumors reflecting upon the official integrity of the other members of the council, is a privileged communication, and furnishes no ground for the expulsion of the member making it, even though the informants upon whom he relies fail to substantiate his statement.
7. The courts are disinclined to hold the speaking of slanderous words a ground for motion from a public office.
8. Where it appears that a charge for which a member of the New Orleans city council was expelled was not formulated or made known to him with substantial certainty, and that he objected to being tried on that ground; that his demand to be allowed the assistance of an attorney was ignored, or denied, whilst able counsel conducted the prosecution; and that he was so expelled after a trial in which he was without witnesses, wholly unprepared, and wholly incompetent to cope with the professional ability arrayed against him, he will be restored to his office by *mandamus*, upon timely application.

A PPEAL from the Civil District Court, Parish of Orleans.—
Theard, J.

Robert J. Maloney, Hugh M. Ansley and Lazarus & Luce, for Plaintiff, Appellant.

Samuel L. Gilmore, City Attorney, and Arthur McGuirk, Assistant City Attorney, for Defendant, Appellee.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

MONROE, J. Relator, having been elected a member of the city council of New Orleans, was expelled from that body, and he prays to be restored to membership by means of a writ of *mandamus*. The council and its members, for cause why the alternative writ should not be made peremptory, show, that, by section 12 of the city charter, the council is authorized to "expel any of its members by a two-thirds vote of all members elected to such council, five days notice and an opportunity of being heard in his defense having previously been given to such member," that the notice thus required was given to relator, as also the opportunity of being heard, but that, even had such notice not been given, it would, by relator's appearing, pleading, testifying, and cross-examining witnesses, have been waived. And they allege that the "discretionary right to determine what causes are sufficient to justify expulsion is not subject to judicial review." Wherefore they pray that the application of relator be denied. The evidence and admissions in the record establish the following facts, to-wit: Relator was elected to the council as the representative of one of the most populous wards in the city and was in the active discharge of his duty up to the moment of his expulsion. Early in October, 1901, he stated to the mayor that he had received information tending to show dishonest practices on the part of certain members of the council, and he requested that officer to consider the statement as confidential for a few days, when, as he said, he would produce his informants; and the mayor acceded to his request. Very shortly afterwards, without any fault on the part of the mayor, a publication on the subject appeared in one of the daily papers. Whether relator was in any wise responsible for this publication is a question which we are not called upon to determine, though we do not wish to be understood as conveying any intimation to his prejudice. However it happened, some version of the matter became public, and the mayor promptly arranged an interview,

in his presence, between the relator and a gentleman whose name had been mentioned as one of the latter's informants, with a view of determining what further action he should take; and, finding that the statements of the parties conflicted, he referred the whole matter to the council. The council, thereupon, appointed a special committee to wait upon the relator and request him "to furnish all information in his possession in connection with any accusations" against its members, and the committee so appointed called upon the relator, and, upon October 22nd, reported to the council, then in session, as follows:

"Committee called on the councilman, October 21st, and he declared:

"1. That he had never made accusations against any member of the city council.

"2. That all information in his possession were only rumors he had heard, which he was not able to substantiate, as to any wrong action of any member of the council.

"3. That the parties on whom he relied to substantiate these rumors had utterly failed to do so.

"4. That if he could have substantiated these rumors, he would have, at once, laid the matter before the grand jury.

"5. That he sincerely regretted to have given circulation to these rumors.

"6. That as a citizen of the community in which he had lived so long and in the welfare of which he was so notably interested, and as a member of this community he regretted very much the publicity given to rumors which at first he was led to believe had some foundation, but which consequently (subsequently) he found out to be vague and could not be substantiated in any form whatever." Relator, being present, stated that he approved the report as made, and it was received and its further consideration postponed until the next meeting of the council. Upon October 29th, the council, having again assembled, the report of the special committee was read and the following motion was offered by the chairman:

"Be it moved by the city council of New Orleans that this council, taking cognizance of the report of the special committee appointed to wait on councilman P. J. McMahon, and to request him to furnish all information in his possession in connection with any accusation against members of this body, and also of the councilman's affirmation at the session of October 22nd, 1901, of the correctness of said report, accepts the expressions of his regret for the statements made or repeated. Be

it further moved that this council desires to record its disapprobation of a member of this council giving circulation to derogatory and unsubstantiated rumors, which acquire weight before the public when coming from a member, and which are incompatible with the dignity and responsibility of a public official. Be it further moved, etc., that this council, now having put on record the apology of councilman P. J. McMahon and disapproval of his conduct and its disapprobation of the circulation of unsubstantiated rumors, especially by a member of this body, considers the incident closed."

To this the relator objected, saying: "Mr. Chairman, before adopting that motion, I certainly will not accept section five of the report. I did not understand it when it was being stated by Mr. Zacharie, and I certainly will not stand by that. I did not circulate that. * * * On my sacred word, I had no idea that section five had any such wording. I have no objection to the balance of the report, but, to section five, I have, decidedly. * * * I would be the last man, if I thought that I had done anything wrong, to refuse to apologize, but, in my estimation, I have done nothing wrong, and I don't think I can apologize at this time. I simply went to the mayor and told him these things, in a confidential way, and if they got out, am I to be blamed?" The position of the relator, then, was, that he had not circulated the objectionable rumors and could not place himself in the position of apologizing for something that he had not done. Evidently, however, it was thought that his statement to the mayor was, in itself, a "circulation." Thus; the chair asked, "Wasn't that a circulation Mr. McMahon?" Mr. McMahon. "No, sir. Not in my estimation. At this moment I don't think that I have done anything wrong." A member of the council. "It strikes me that whatever private conversation has taken place between councilman McMahon and the Honorable Mayor, the whole thing recoils squarely against the dignity of this body, and nobody else, and there is no use to try to get around it. There it is at our very door, right at the door of this body, and you cannot take it off unless it is purged some way or another. Unhappily for the gentleman, if he continues in the line he has adopted, although we have shown him all sympathy in the matter, if he proposes to continue as he has started to-night, of course he is like every man, he must take the consequences." By another member: "Now I move that, in view of the odium cast upon this council, it matters not by whom, but the circulation of these rumors has cast a stigma upon us that never will be

wiped out during the life of this administration. I, for one, don't care to use any drastic measures, but the council must be vindicated, or the charges made must be substantiated. And now, in order to give to the gentleman an opportunity of saying to this body whether he is right or wrong, I move that the chair request the gentleman to tender the necessary apology, and one fitting to the cause of all this scandal." The Chair: "Mr. McMahon, are you prepared to make an apology at all?" McMahon: "No, sir, I am not prepared. I can't make any apology." The Chair: "None at all?" McMahon: "I haven't done anything wrong that I know of." The Chair: "The remarks you have circulated?" McMahon: "I never circulated them." Another member: "I make this substitute: that the gentleman be called upon at the next meeting to substantiate the charges made, or to apologize, or to accept this as a legal notice, under the charter, that a motion will be made for his expulsion."

This suggestion was reduced to the form of a motion as follows: "Be it moved that, in view of the statement made on the floor of this council at this meeting by Councilman McMahon, that he does not consider that he has committed any offense against the dignity of this council, or any member thereof, that should cause him to apologize, that this council demands that Councilman McMahon shall substantiate the charges made by him, or apologize before this body at its next meeting, and in default thereof to take this as a notice, under the city charter, to answer why he should not be expelled from this body."

This motion was then adopted and the council adjourned until November 5th. Upon that day, however, relator presented a petition to the civil district court setting forth what had taken place and praying that the council be enjoined from proceeding further in the matter of said motion, and, as a rule *nisi* was issued ordering the council to show cause on November 8th why the injunction should not issue, no further action was taken until the evening of November 8th, when the rule *nisi* having been discharged, and an application to this court for prohibition, *mandamus* and *certiorari*, as against the district court, having been denied, the matter was again taken up and proceeded with as follows:

The clerk reported that a copy of the motion of October 29th had been sent to Mr. McMahon and the latter admitted that he had received it, and, being called upon for his answer, offered the following: "I object to the adoption of the resolution passed October 29, 1901, and any action which may be had thereunder for the following reasons:

"First. That no specific charges have ever been formulated against me.

"Second. That no notice of any charges has ever been served upon me.

"Third. That no copy of any charges has ever been served upon me.

"Fourth. That no time and place have been fixed for the hearing of any charges.

"Fifth. That no opportunity has been given to make a proper defense.

"In conclusion, I desire to state that my purpose in making the above objections is to properly meet and defend any charges that may be made against me, and I further desire a complete, full, and public investigation.

"Respectfully yours,

(Signed) "P. J. McMAHON."

The objections thus offered were overruled without debate; the original motion and the report of the special committee were each read twice, and thereupon the following was offered by one of the members: "I move that we proceed to prove up the statements made in that report, that Councilman McMahon gave utterance to the slanderous charges stated therein." Section 12 of the city charter was then read, after which the suggestion was made by a member and by the chair: "Mr. McMahon, you have an opportunity of explaining * * * why you should not be expelled," and, no further explanation being offered, a witness was sworn on behalf of the prosecution, to whom the question was put: "Will you kindly state what took place in the mayor's parlor, when Mr. McMahon, certain members of the council and yourself were present, in relation to this subject-matter, and wherein certain charges were made by Councilman McMahon, also when Dr. Pratt was present and what he said and what Mr. McMahon said?" Mr. McMahon: "Do I understand that Dr. Pratt was there?" Mr. Stanley (a member): "One question." The Chair: "You are out of order." Mr. Stanley: "Hold on, give me a chance." The Chair: "Out of order." Mr. Frantz (a member): "If he will be short and brief, I will ask that he be heard." The Chair: "You are out of order, I rule." Mr. Stanley: "I put one question: is Mr. McMahon entitled to an attorney or not?" The Chair: "Out of order." Mr. Stanley: "Answer, yes or no." No answer to this question was given and the council, through one of its members, proceeded with the examination of the witness, in which

McMahon, from time to time, participated, and in the course of which he, now and then, made a statement on his own account and was, in turn, questioned by the members of the council, the proceedings, judged by the standard of rules established for trials in judicial tribunals, being conducted irregularly. On more than one occasion the accused complained that he was unprotected, meaning that he was without legal advice, whilst the prosecution was being conducted by a member of the council, who was also a member of the bar, and with the aid of one of the legal advisers of the city. At one time, relator asked, "Would you object to my being protected by a lawyer?" To which the reply was given by the member who was conducting the prosecution, "It is not for me to answer that; I am not the council." The relator then said, "I ask of the council, I pray that you give me a fair and square hearing. I am simply and purely a business man, and not a politician, and not a lawyer. Give me some time to prepare myself, and I will give you everything I know." It seemed to be the sense of the council, however, that he had had sufficient time and notice and the trial went on, with the result that the following resolution was adopted:

"That Councilman P. J. McMahon, having defamed the good name of the council by uttering and circulating slanderous charges against certain members of the body, whose names he has not given, and having failed either to substantiate his assertions or to express regret or retraction therefor, although given ample notice and opportunity so to do, and whose conduct in the premises is deemed a reproach and a stigma on the council, through which he has forfeited the esteem of that body, be it moved that said councilman, P. J. McMahon, be, and he is, hereby expelled from the council of the city of New Orleans."

And, thereafter, within a fortnight, the application which we are now considering was presented to the district court, and, after hearing, denied. And from the judgment so rendered, relator prosecutes this appeal. It may be further stated that, as matter of fact, the relator had summoned no witnesses and none were examined on his behalf, nor does it otherwise appear that he had prepared for a trial, on the merits, of any charge which it might have been the intention of the council to prefer against him. On the contrary, he did not seem to realize that he was being tried, but was evidently under the impression, until the contrary appeared, that the council would do no more, for the time being, than dispose of the exceptions which he had offered, and that the trial upon the merits could not take place until that had been done and the case had been again fixed.

OPINION.

In the absence of either express grant, or express or implied, limitation, of authority, a municipal corporation, as ordinarily constituted, possesses the incidental power, *for cause*, to remove corporate officers, whether elected by it or the people. If an officer has no franchise in his office; that is to say, if the nature of his office is a mere employment, the power to remove may be exercised without notice or hearing, subject to the liability of the corporation to an action in damages for breach of contract, if, by removing or discharging him, a contract has been violated. But, where there is a franchise in the office resulting from an election, or appointment, for a term established by law, there must be a charge against him, stated with substantial certainty, though not, necessarily, with the technical precision required in indictments; notice must be given of the time and place fixed for the hearing of such charge; reasonable opportunity must be afforded to answer the same, and to produce testimony; and the officer is entitled to be heard and defended by counsel; to cross-examine witnesses, and to except to the proof against him. If the charge be not denied, still, it must, if not admitted, be examined and proved. And, where the specific charge stated is insufficient to justify removal, or where, being sufficient, there is no evidence to sustain it, the officer is entitled to a *mandamus* to restore him. Dillon on Mun. Corps., Vol. 1, 242, 250, 253, 255. Thompson's Com. on the Law of Corps., Vol. 1, 820, 882.

"The analogies of the ordinary procedure in the courts of the state (in the absence of statute or by law) may be followed respecting such details as the notice, or summons, mode of service, etc. Notice may be dispensed with: By appearance and answer to the charges. 2. By a total desertion of the place, so that it is not practicable to give the notice, as where the officer has permanently, not temporarily, left the municipality and resides elsewhere constantly, with his family. Though he may have been absent or left the borough, yet, if he return and be in the place at the time of the motion, he is entitled to notice. If the motion be for good cause, such as the conviction of an infamous crime, or the repeated declaration of the officer that he would not discharge the duties of his office, while it would be more regular to give the notice, yet its omission will not entitle him to a *mandamus* to be restored, for, if restored, he could be removed again, and the courts will not order a restoration, where they can see that there is good ground for an amotion, and that the order to restore would be without practical and useful

effect. With these exceptions, the party is entitled to notice of the intention to amove, so that he may have full and fair opportunity to be heard in his defense." Dillon on Mun. Corps., Vol. 1, 254.

The power of amotion conferred upon the city of New Orleans by its charter is neither greater nor less, in so far as the members of the council are concerned, than it would have been had that instrument been silent upon the subject. The only thing that can be said of it is, that, having been conferred by express grant, it relieves the situation of the doubt which, at times, has been suggested, as to whether such power is, incidental, or may be implied, in a municipal corporation. The section 12 of the charter, upon which the respondents rely, authorizes the council to "expel one of its members by a two-thirds vote of all the members elected to such council, five days' notice and an opportunity of being heard in his own defense having previously been given such members." This language, necessarily, presupposes a charge sufficiently grave to justify expulsion, for the hearing of which time and place are fixed; for, if there be no such charge, and no time and place fixed for the hearing, there can be no defense and nothing of which to give notice. This provision of law must also be construed with those which, referring to the writ of *mandamus*, read: "It may be directed to all corporations established by law: * * * 2. To compel them to receive and restore to their functions such of their members as they shall have refused to receive, although legally chosen, or whom they shall have removed without sufficient cause." C. P. 835.

"The sufficiency and reasonableness of the cause of removal," says Mr. Dillon, "are questions for the courts." Dillon Mun. Corps., Vol. 1, 252. This language is applied by the author to cases in which the power of amotion is implied. But we can find no reason for holding it to be inapplicable in the instant case, since, as we have seen, the only express authority conferred upon the respondent council with respect to the amotion of its members contemplates that such action shall be predicated upon "charges," and it would be unreasonable to suppose that the lawmaker intended that charges having no relevancy to the subject, or which, being relevant, are sustained by no proof, can afford a basis for legal expulsion.

True it is, that, where in such a case, a charge sufficiently grave to justify expulsion has been preferred, and the accused has received the notice, and has been afforded the opportunities for defense, to which he is entitled, and there has been evidence adduced in support of such

charge, the courts will not, ordinarily, go behind the judgment rendered for the purpose of inquiring "*into the amount, or the balance, of evidence.*" The soundness of the two propositions thus stated and the distinction between them have been heretofore recognized by this court in an opinion from which we quote as follows (beginning with the concluding paragraph of an excerpt from a text-book of recognized authority), to-wit: "While the judgment of inferior boards or tribunals upon matters which properly rest in their discretion will not be controlled or interfered with by *mandamus*, their judgment as to what the law allows them to determine, as to the extent of their jurisdiction, may be so controlled." High Ex. Leg. Rem., Sec. 69. "But" (said the court) "in order to escape the consequences of this universally recognized principle the learned counsel for the respondent takes the position that, under the powers conferred by the police statute, the right of removal is *discretionary* with the mayor. We do not think so. The statute gives the mayor power to remove, it is true, but he can proceed only upon "charges preferred," and "in all cases the commissioners shall have an opportunity to present evidence on their behalf. Or, in other words, there must be charges preferred, a trial had, evidence adduced, and a judgment rendered. These proceedings are limitations which are placed on the mayor's power of removal, and the determination of what is just cause for removal is deemed a question of law," says Mr. High, "whose ultimate determination rests, not with the officers empowered to remove, but *with the courts.*" State ex rel. Denis vs. Mayor, 43 Ann. 106-7.

The questions with which we are at present concerned are: What was the charge preferred against the relator? Was he informed of it? Was it sufficient, if proved, to justify his expulsion? Was he afforded the opportunity to be heard to which he was entitled?

The charge of which he received notice was embodied in the resolution of October 29th, which reads:

"Be it moved that in view of the statement made on the floor of this council, at this meeting, by Councilman McMahon, that he does not consider that he has committed any offense against the dignity of the council, or any member thereof, that should cause him to apologize, that the council demands that Councilman McMahon shall substantiate the charges made by him or apologize before this body at its next meeting, and, in default thereof, to take this as notice, under the city charter, to answer why he should not be expelled from this body."

The resolution of expulsion reads as follows:

"That Councilman P. J. McMahon having defamed the good name of the council by uttering and circulating slanderous charges against certain members of that body, whose names he has not given, and having failed either to substantiate his assertions or to express regret or retraction therefor, although given ample notice, and whose conduct in the premises is deemed a reproach and a stigma on the council, through which he has forfeited the confidence of this body, be it moved that said councilman, P. J. McMahon, be, and he is hereby, expelled from the city council of New Orleans."

It is not easy in the light of what has transpired, or in any light, to determine the exact nature of the charge intended to be preferred by the first of these resolutions. And this emphasizes the propriety of the rule which requires that such charges shall be stated plainly, if not with technical precision. From the proceedings which took place at the time, a portion of which we have reproduced, it appears that the relator denied that he had ever made the statements which were considered as constituting his offense to anyone except the mayor, and, perhaps, a brother member of the council, and to them under the seal of secrecy; and it also appears that it was the opinion of some, if not all, the members of the council by whom the resolution was adopted that for him to have repeated to the mayor or to another member a charge which had come to his ears affecting the honesty of the council as a body, or of its members, individually, was an offense worthy of expulsion, unless he stood prepared to substantiate such charge, or to apologize for having so repeated it.

It is impossible, therefore, either from the language of the resolution, or from the evidence in the record, to determine whether the statements which the relator was called upon to substantiate, or apologize for, under penalty of expulsion, were those which, on information received, he had made to the mayor, or whether they were statements which it was the purpose of the resolution to charge him with having circulated in public. In so far as his communication was confined to the mayor, it was privileged, and did not constitute the "uttering or circulating" of slanderous charges, etc., for which, by the resolution of November 8th, he was expelled, since he was a member of the council, and had the right, in his own interest, and in the interest of the government of which the council and the mayor formed part, to bring to the knowledge of the latter any rumor affecting the reputation of that government, or its members, of which he may have been informed. Upon the

other hand, if it was the purpose of the resolution to charge that he had given public circulation to slanderous rumors, there ought to have been some sort of specification, though even then the proposition that one member of a municipal council will be expelled because he has slandered, or libelled, another member, is not supported by authority. In fact, it is said, by Mr. Dillon, to have been held in most cases that insulting language, or libel, by one member of such body to, or upon another, is to be punished by law and not by the corporation. Dillon, Vol. 1, 252, note 1; by Mr. Thompson, that "an analysis of the cases shows a strong disinclination on the part of the courts to hold the speaking of slanderous words as a ground of amotion." Thompson's Com. on the Law of Corps., Vol. 1, 810.

Beyond this, it appears, in the instant case, that the proceedings against the relator were conducted with the aid of one of the city's legal advisers, there present, and by a member of the council who is also a member of the bar, and that the request that the relator should be allowed the assistance of an attorney was ignored, and, in effect, denied. That, as a matter of fact the relator was wholly unprepared for a trial on the merits, and that he was wholly incompetent to cope with the professional ability arrayed against him, is abundantly manifest. We infer that the exceptions offered by him were prepared by legal advice and this was no doubt done with the expectation that, whether they were sustained or overruled, another day would be fixed for the hearing on the merits. When, therefore, he had offered them and they were overruled, and the council ordered that the trial should proceed, he found himself without advice or witnesses and, practically, helpless; and, in view of his application for relief, we do not think that he should be held to have waived his rights. There is no doubt that a good deal had taken place to arouse the just indignation of the council, and, believing as the members did, that the proceedings against the relator were regular, and that, in any aspect of the case, they had the right to expel him, it is fair to say that they acted not only without prejudice, or passion, but with forbearance, since they endeavored to persuade the relator to accord that which they believed they had the right to demand. For the reasons which we have stated, however, our conclusion is, that the relator was not sufficiently informed of the charge against him and that he was not afforded the opportunity for defense to which he was entitled.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be

judgment in favor of the relator and against the respondents, the city council of New Orleans and the members thereof, ordering and commanding said respondents to repeal and annul the resolution whereby relator was expelled from said city council and to restore him to membership and to the full discharge of his functions as a member. It is further ordered that respondents pay all costs.

BLANCHARD, J., took no part, being absent.

No. 14,112.

LINEHAN RAILWAY TRANSFER COMPANY VS. NEW ORLEANS & NORTH-
WESTERN RAILROAD COMPANY.

SYLLABUS.

A contract entered into has the force of law between the parties. Their rights under it are to be determined by that interpretation of its provisions which gives the greater assurance of arriving at the intention of the parties.

A PPEAL from the Tenth Judicial District, Parish of Concordia--
Dagg, J.

Samuel Lucuis Elam, for Plaintiff, Appellant.

Lazarus & Luce, for Defendant, Appellee.

The opinion of the court was delivered by

BLANCHARD, J. Plaintiff is appellant from a judgment denying its interpretation of a contract entered into between the Linehan Ferry Company, of which plaintiff is the assignee and successor, and defendant company, and rejecting its demand founded upon such interpretation.

The contract in question was executed in writing between the parties in July 1890, and had for its object the transfer of defendant's passenger, freight and other cars, and locomotives, to and fro, across the Mississippi river at and between the City of Natchez, in the State of Mississippi, and the town of Vidalia, in Louisiana.

Defendant's line of railway crossed the river at that point, and,

hence, the necessity of ferry arrangements for the transfer of its trains over the river.

This transfer service was performed by the Linehan Ferry Company and its successor, the plaintiff company, from the fall of 1890 until November 1st, 1900, when defendant railway company ceased to avail itself of its services. Notice of the discontinuance had been seasonably given by defendant, and on and after the date last mentioned its trains were crossed over the river by means of other arrangements that, meanwhile, had been made.

Plaintiff protested and offered to continue the service, putting defendant regularly in default in respect thereto.

This suit followed. It is predicated upon the idea that the contract made in 1890 did not terminate on October 31st, 1900, and that plaintiff has the legal right to continue to perform the transfer service for defendant after that date, as it had been doing for the ten years prior thereto, and to continue to receive the compensation agreed on in the contract for such service.

The contention of the plaintiff is that the contract stipulates no time for its termination—on the contrary, that it cannot be brought to an end except by mutual consent of the contracting parties.

The object of the suit is to compel defendant to specific performance, and the prayer of the petition is for judgment decreeing the contract to be in force and giving effect to it by ordering defendant to comply with the obligation it had assumed therein.

There is a further prayer, that, in the event the court should hold the contract terminated on the 31st of October 1900, and cannot now be enforced, plaintiff do have and recover of defendant the value of its inclines on both the Mississippi and the Louisiana side of the river.

One of the stipulations of the contract was that the inclines, transfer cradles, etc., should be constructed upon lands owned or leased by defendant corporation at Natchez and Vidalia, and this had been done.

The contention of defendant is that by its terms the contract was to terminate ten years from November 1, 1890, and, therefore, ended on November 1, 1900; and that in announcing to plaintiff its determination not to renew it, it, likewise, gave plaintiff notice to remove its property and plant from its (defendant's) premises.

Its further contention is that whatever works or constructions were placed on its premises by plaintiff were for the latter's own purposes

and convenience, and it (defendant) cannot be compelled to take and pay for the same.

The contract, whose interpretation is at issue, consists of clauses or sections, numbered respectively from one to sixteen inclusive.

It is with the eleventh and thirteenth only that we are here concerned.

The eleventh reads:—

It is further agreed that this contract, in respect to service to be rendered by the party of the second part (plaintiff herein) and the payment to them therefor, shall remain in force, binding upon both parties, for the period of ten years from November 1st, 1890. If, at the end of five years, the party of the first part (defendant herein) wishes to buy out the property of the party of the second part, the basis of profit they allow will be based on the fifth year's business for the remaining five years of contract.

There does not seem to be any ambiguity here. The contract shall remain in force and be binding upon both parties for ten years.

But plaintiff contends this is so only in respect to the service to be rendered by it and payment therefor, and that the words expressive of this limitation clearly show that clause eleven only contemplated a partial change in the contract at the end of ten years, and that elsewhere in the contract must be looked for and found what the real intention of the contracting parties was in respect to the duration of the contract.

It strikes us, however, that when the service plaintiff was to render and the payments therefor defendant was to make are taken out of the contract, nothing of essence is left in it.

Under clause eleven, the obligation of defendant to permit plaintiff to do, for a consideration, its transfer service between Natchez and Vidalia ceased at the expiration of ten years. During the ten year period neither party was at liberty to withdraw from the contract; but, thereafter, either party could withdraw.

That the life of the contract was limited to ten years, and that such was the intention of the parties, is, further, indubitably shown by the concluding sentence of clause eleven. There it is expressed that if defendant at the end of five years wished to buy the property of plaintiff (meaning its inclines and transfer plant and outfit) the basis of profit to be allowed plaintiff was to be predicated on the fifth year's business *for the remaining five years of contract.*

This language—"the remaining five years of contract"—means and can only mean that ten years was the full limit of the contract, five years of which were to elapse before defendant's option to buy arose and then, if it elected to buy, a predicate for the price to be paid for the remaining five years was agreed on.

Why make use of the expression "for the remaining five years of contract" if the contract was to live and be in force beyond November 1, 1900, which would mark the limit of ten years from its inception?

The reliance of plaintiff is on clause thirteen of the contract as showing the true intention of the parties with respect to the duration of the agreement.

That clause reads:—

It is further understood and agreed that if the parties to this agreement desire it shall finally terminate at the expiration of ten years, herein mentioned, then the parties of the first part (defendant herein) shall have the right to purchase cradles and transfer boats and inclines by paying therefor a fair and just compensation, and if the price cannot be agreed upon, then it is to be left to arbitrators * * * whose decision shall be final.

Plaintiff construes this to mean that the agreement was to be considered terminated at the end of ten years only by consent of both parties; that if either party desired it to continue, it should continue even though this was against the wish of the other party.

Such a construction nullifies, practically, clause eleven.

The true meaning of the thirteenth clause, we think, is that the parties contemplated that while the binding force of the contract as made in 1890 ended in 1900, as set forth in clause eleven, yet it was probable or possible they might desire to renew it, but that if they, or either of them, did not wish to renew and preferred it to finally terminate in 1900, then defendant was to exercise, if it chose, the right to purchase the property at a fair price, and if this price could not be arrived at by the parties themselves, arbitrators were to be called in.

This construction avoids all conflict with clause eleven, and brings clause thirteen into harmonious relation with its sister clause.

To hold that the intention of the parties as evidenced by clause thirteen was the contract should have no term, no period of duration, could not terminate except by mutual consent, is to give it an unusual quality indeed. Like Tennyson's brook:

For men may come and men may go,
But I go on forever.

Railway Transfer Co. vs. Railroad Co.

The construction that would lead to such a result is an impossible one.

Nor was it the one held by plaintiff company prior to the announced purpose of defendant to consider the agreement terminated at the end of ten years, if we are to give weight to the utterances of its chief executive official.

Bart E. Linehan was president of the company and its general manager. He was, too, the owner of the controlling interest of its stock, and one of the five persons constituting its Board of Directors.

On March 20, 1899, he wrote defendant's general manager relative to a renewal of the contract, and this is the way he began his letter:—

As our contract for transferring freight, passengers, etc., expires Nov. 1st, 1900, and these contracts are usually re-arranged a year before the contract expires, I would like to know if you could assure us a renewal of the contract for ten years more.

It is useless for plaintiff to attempt to break the force of this admission of its president as to the time limit of the contract by the plea that that official was without authority to construe the contract—that only the Board of Directors could do that—and that the letter referred to was written without the authority of the Board.

Promptly on receipt of the letter, defendant's general manager replied as follows:

I am in receipt of your letter of the 20th inst. relative to your contract with the company, and which expires on November 1st, 1900. We will be unable to renew the contract in question, as we have made arrangements already in regard to this matter.

Further comment is useless.

With regard to plaintiff's alternative demand, that if it be decreed the contract was limited in duration to November 1, 1900, and specific performance is denied, defendant be held answerable for the value of the works, we find nothing in the contract warranting this. There is a clause which gives defendant the right to purchase the outfit at the termination of the agreement, but not a word putting an obligation upon it to do so.

Defendant does not want the works, they are no value whatever to it, are in the way (being on its property), and has notified plaintiff to remove the same.

The articles of the Code referring to works, constructions and im-

Bank vs. Planting and Refining Co.

provements put by one upon the soil of another have no applicability here.

The district judge reserved to plaintiff the right to remove its inclines and appurtenances from the land. It is entitled to nothing more.

Judgment affirmed.

No. 13,495.

HIBERNIA NATIONAL BANK VS. SARAH PLANTING AND REFINING COMPANY,
LIMITED, JOHN E. KIMBRO, THIRD OPPONENT.

SYLLABUS.

1. To constitute the immobilization of movable property, it is essential that the ownership of the original immovable (plantation in this instance) and the movable placed upon it be vested in the same person.
2. That fiction of the law which holds that a movable placed upon an immovable becomes immovable by destination does not destroy the vendor's privilege resting upon the former.
3. A pre-existing indebtedness is sufficient consideration for the transfer of property.

ON REHEARING.

1. Where mules and agricultural implements belonging to the lessee or the overseer of a plantation are seized and advertised for sale with the plantation, as immovables by destination thereon, and a private understanding is had by which the sale is permitted to take place, and the plantation and mules and implements are adjudged to the seizing creditor, who in pursuance of the private understanding sells them as bought, taking the notes of the purchaser for the price with reserve of vendor's privilege and special mortgage to secure the payment of the notes, the notes being made to the order of the purchaser and by him endorsed in blank, the said lessee or overseer will be estopped from contesting the mortgage and vendor's privilege thus created on the mules and agricultural implements, as against a third person who has acquired the notes in good faith and in due course of business.

A PPEAL from the Nineteenth Judicial District, Parish of Iberia—
Voorhies, J.

Walter J. Burke & Bro., for Plaintiff, Defendant in Opposition,
Appellant.

Andrew Thorpe and Thomas Horace Thorpe, for Third Opponent,
Appellee.

Bank vs. Planting and Refining Co.

The Opinion of the Court, on Motion to Dismiss, was delivered by
WATKINS, J.

On the Merits, by BLANCHARD, J.

On Rehearing, by PROVOSTY, J.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. The third opponent and appellee seeks to dismiss the appeal on the ground (1) that no citation of appeal has ever been issued to, or served upon him, as the law requires; (2) that the appellant has not furnished an appeal bond in conformity to law.

The latter ground is only urged in the alternative that the former should not be sustained.

I.

The averment of the motion is, that no citation of appeal has been directed to the third opponent nor served upon him as required by law, either in person or otherwise.

It appears from the record that the judgment appealed from was signed on the 9th of November, 1899, in favor of the third opponent, and that the plaintiff sought to appeal by means of petition and citation.

An order of appeal was regularly granted, making the appeal returnable to this court, sitting in New Orleans, on the fourth Monday of March, 1900, and according to law—fixing the amount of the bond for suspensive appeal according to law, and devolutive at one hundred dollars.

A citation of appeal was issued by the clerk and placed in the hands of the sheriff; but he made a return that he had failed to make service upon the appellee on account of his absence from the State.

As an answer to the motion to dismiss, the appellant's counsel has tendered for our consideration, affidavits of the clerk and sheriff, that no fault in the premises was attributable to either the plaintiff or its counsel.

We think that is evident from the record, aside from those affidavits.

It appears that no proper service of citation of appeal has been made

since the appellee's motion was filed, and it will be necessary that all further proceedings be stayed until the appellee has been cited.

Cockerham vs. Bosley, 52 La. Ann. 65.

The objections urged to the appeal bond are (1) that the amount for which the bond was given is below that fixed in the order of appeal, and it is therein expressly stated to be for a suspensive appeal; (2) that the bond is not conditioned as the law requires, in that it declares that the appeal was made returnable on the fourth Monday of *November*, 1900, whereas the transcript was filed in this court on the 26th of March, 1900. Neither of these objections are at all serious.

The evident intention of the appellant was to give a devolutive appeal bond, notwithstanding the term "suspensive" was inadvertently employed; and, being so considered, we think *this* objection is not well taken.

(2) The recital in the bond that the appeal was returnable on the fourth Monday of *November*, 1900, is manifestly a clerical error, inasmuch as the order of court makes the appeal returnable according to law, and the citation of appeal specifies the return day as the fourth Monday of *March*, 1900.

The motion to dismiss is denied, and it is ordered that further proceedings be suspended until appellee is cited according to law, and to this end it is directed that the case go over until the term of this court beginning the first Monday of November A. D. 1900.

BLANCHARD, J. A motion to dismiss the appeal herein because of defective service of citation of appeal, or want of citation, having been denied, and time granted appellant to make proper citation of appeal, a renewal of the motion to dismiss is now made on the ground that the second service of citation of appeal is legally insufficient.

And so it is, judged by the return of service of the second citation of appeal first made by the deputy sheriff. But a second, or amended, return made by him and certified as conforming to the facts, cures the defect.

The motion to dismiss is denied.

ON THE MERITS.

The Hibernia National Bank, holding notes and mortgages of the Sarah Planting and Refining Company for a large amount of money,

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seized under executory process the Sarah plantation, with its equipment, and advertised the same to be sold by the sheriff.

Included in this seizure and advertisement were wagons, harness, implements, etc., and nineteen mules.

John E. Kimbro intervened, by third opposition, alleging that the Sarah Company had purchased from him the wagons, harness, implements, mules, etc., on the said plantation for the price and sum of \$2603.50 and owed him therefor that sum, to secure payment of which he had the vendor's privilege. He asked judgment for the amount due him with recognition of his privilege.

He further alleged that the movable property upon which his privilege rested had been seized by the sheriff in the foreclosure of the mortgage held by the Hibernia National Bank; that his privilege primed the bank's mortgage upon the proceeds of the movables seized; and that to render the rights he claimed effective and available, it was necessary there be a separate appraisalment and separate sale of the movables, apart from the land. He prayed accordingly, and an order issued for the separate appraisalment and sale.

He also prayed to be paid by preference out of the proceeds of the movables.

The mules were appraised at \$1900 and the other property embraced in the intervention at \$703.50.

The defense against the demand is that the movables in question had been attached to the Sarah plantation for some time as part of its equipment and were so attached when the property was sold by Jos. Weil (the bank's transferror of the mortgage notes) to the Sarah Planting and Refining Company. It is averred that the same were included in the sale made by Weil to the Company, and in the mortgage retained to secure the purchase price—all to the knowledge of the third opponent. Furthermore, that they were upon the plantation, and sold as part thereof, at the antecedent sheriff's sale at which Weil had purchased—also to the knowledge of opponent.

It is, therefore, claimed that the latter is estopped to now set up ownership in himself.

There was judgment below in favor of the third opponent, in accordance with the prayer of his petition, and from this judgment the Bank appeals.

The conclusion we have reached is, this judgment is correct.

The issue is one of fact. We think the evidence adduced establishes

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that George B. Kimbro, the brother of the third opponent, purchased the nineteen mules from the Marx Levy heirs as early as February 1897; that he gave therefor his promissory note, dated February first of that year; that this note passed into the hands of Jos. Weil, who bought the Sarah plantation (then known as "Eldorado") from the Levy heirs; that from Weil it passed to Pearce & Canty, when he sold the plantation to the latter in April 1897; and that the note was afterwards taken up by Kimbro. It may not have been taken up by payment in cash, but was taken up by means of the holders of the note becoming indebted to Kimbro and in compensation and satisfaction of the debt surrendering the note to him.

At the time the Levy heirs sold the mules to Kimbro, they also leased him the plantation for a term of three years. This lease was duly recorded in the conveyance records of the Parish. Kimbro went into possession, employing John E. Kimbro as manager and using the mules in the cultivation of the plantation.

When, therefore, Weil purchased the place from the Levy heirs, Kimbro was in possession under his recorded lease. So, too, he was in possession under his lease, and continued to be, when and after the place was sold by Weil to Pearce & Canty on terms of credit with mortgage retained.

The latter went into insolvency and the plantation was seized under Weil's mortgage and vendor's privilege. At the sale which followed, Weil purchased and immediately sold the property at private sale to the Sarah Planting and Refining Company, which was organized at that time. This sale was on credit, and the notes thereof subsequently passed into the hands of the plaintiff Bank.

George Kimbro having thus acquired the ownership of the mules and the same being in his possession, transferred the same to his brother Jno. E. Kimbro, third opponent herein. This sale and transfer was in settlement of an indebtedness due by George B. Kimbro to his brother on account of services rendered by the latter as manager for the former of the plantation. He was unable to pay him in money "on account of short crops and poor prices," and that is why the mules were given to him in payment. A pre-existing debt due by a transferor of property to his transferee is sufficient to support the transfer. 51 La. Ann. 222.

The mules were at the time in possession of Jno. E. Kimbro as manager for his brother. Thereafter they remained in his possession as

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owner until he sold them to the Sarah Planting and Refining Company in February 1899.

All the parties connected with the Sarah Company recognized the Kimbros as owners of the mules and other movable property claimed in the third opposition. Weil, too, did so, for in February 1898 we find the same included in the terms of an act of pledge and pawn which he took from George B. Kimbro for and on account of advances made and to be made to enable the latter to make a crop in that year.

Jno. E. Kimbro testifies he bought the mules from his brother in the fall of 1897. The brother places the time at a later period. We do not think the discrepancy sufficient to materially weaken the case of the third opponent. In the negotiation with his brother which resulted in the transfer of the mules, the latter were taken at the price of \$1300. Five hundred dollars of this was to be considered as cash—that much being due him as balance on account of his services as manager for 1897. The remainder, he testifies, “was to be paid the following year, either in cash, or by my services.”

The other movable property mentioned in the third opposition originally belonged to Jno. E. Kimbro. He had not acquired it from his brother, but from other parties, and the same remained his and in his possession until he sold it to the Sarah Company.

The plea of estoppel does not apply against the third opponent. He was no party to any of the acts of conveyance, mortgage or pledge upon which estoppel is predicated. Their recitals cannot be held to affect his rights. Nor do we think there is any impediment to his claim in the nature of estoppel by conduct. Such an estoppel arises when the party pleading it has been misled by the action, or the omission to act, of the other party at the proper time, and was thereby himself deceived into doing something to his detriment which otherwise he would not have done.

Judgment affirmed.

ON REHEARING.

PROVOSTY, J. Further consideration of this case has convinced us that the plea of estoppel should be maintained, in so far as the mules and those of the agricultural implements that were included in the Weill vs. Pearce & Canty seizure are concerned. These mules and implements were seized, and were adjudicated to Weill as immovables by destination on the plantation; and as such passed with the plantation

in the sale by Weill to the Sarah Planting and Refining Company, becoming thereby subjected to the vendor's privilege and special mortgage reserved by Weill on the plantation to secure the price of the sale, which is the vendor's privilege and special mortgage that the bank is now foreclosing. If the opponent stood by, and without protest suffered these movables to be thus sold and mortgaged, he is estopped from contesting the mortgage, as against one who has acquired the mortgage claim in good faith and in reliance on the record. It is hornbook law that one who stands by and without protest suffers his property to be sold to an innocent purchaser, is estopped from gainsaying the title of the purchaser. This principle applies with even greater force to one who stands by and without protest suffers his property to be mortgaged to secure notes which he knows are to become instruments of commerce; he is estopped from gainsaying the mortgage as against the innocent holder of the mortgage notes. Especially is he estopped if he has not simply stood by without protest, but actually been a party to the arrangement in execution of which the mortgage has been created. Am. & Eng. Ency. (New Ed.), Vol. 11, pp. 421, 424, 427, 430, 431; 5 R. 523; 30 Ann. 1251; 45 Ann. 307, 321; 48 Ann. 18.

We think that the opponent not only stood by quiescent while his property was being sold and mortgaged, but actually consented to the proceeding. His brother, George Kimbro, was questioned, and he answered as follows:

"Question—At the time Weill seized Sarah plantation and advertised it for sale in the spring of 1898, did you file any opposition to that sale, claiming these mules?

"Answer—No, I made no opposition. My reason for this is that we had bought the property at private understanding before the sale, and the sale was going through only as to give the title."

The existence of this *private understanding* is not disproved by other testimony in the record; on the contrary, everything goes to show that there must have been some understanding. Otherwise, the quiescence of the opponent would be inexplicable. But the bank was not a party to this *private understanding*, and had no knowledge of it, and is not bound by it; and having acted on the faith of the record, can hold opponent to the verity of this record, in the making of which he participated.

The estoppel applies only as to the implements that were embraced in the Weill vs. Pearce & Canty seizure; but while the testimony leads us

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to believe that not all the implements for which claim is now made were thus included, it does not enable us to determine which of these implements were and which were not included. In the interest of justice we think that the case should be remanded for further trial on this point.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court herein be set aside; and that the opposition herein be dismissed, in so far as the mules are concerned; and that the case be remanded for further trial, in so far as the agricultural implements are concerned, with instructions to the lower court to give judgment in favor of the opponent for those of the implements that were not included in the sale in the matter of Weill vs. Pearce & Canty, and in favor of the Hibernia Bank for those of the implements that were thus included; and that the opponent pay the costs of this appeal; and that the costs of the lower court be paid out of the proceeds of the sale or by the opponent accordingly as the opponent shall succeed or not in his opposition, in part or in whole.

BLANCHARD, J., dissents, holding to the view presented in the original opinion of the court.

No. 14,195.

ARTHUR RICHARD VS. CYPREMORT DRAINAGE DISTRICT.

SYLLABUS.

1. Drainage districts established under laws existing at the time of the passage of Act 12 of 1900 cannot take advantage of the act without first reorganizing under its provisions.
2. Drainage districts established under laws in existence at the time of the adoption of Article 281 of the Constitution may take advantage of the provisions of this article without reorganizing under Act 12 of 1900.
3. Drainage districts organized under Act 37 of 1894 may levy the tax and issue the bonds authorized by Article 281 of the Constitution without having recourse to the provision of Act 12 of 1900, passed for the purpose of carrying said Article 281 into operation; that is to say, such districts may levy said tax and issue said bonds under the combined provisions of said Act 37 and said Article 281, and irrespective of the said enabling act.
4. The limits of a taxing district must be fixed with certainty; especially where such district is authorized to impose a property tax, and still more especially where such tax must be voted for. Uncertainty in respect to the limits of such a district invalidates its organization, and as a consequence all taxes it may propose to levy and all bonds it may propose to issue. Any taxpayer of

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the district may urge such invalidity in resistance of the tax or in prevention of the issuance of the bonds.

5. Drainage districts organized under Act 37 of 1900 cannot cut or open new drains without consulting the taxpayers of the district.

ON REHEARING.

The police jury has the power to divide the parish into drainage districts.

Boundaries given by this body in its ordinance are set out with certainty enough to enable a surveyor properly to trace the lines.

The southern boundary was not specially contested; it is sustained as sufficient as set out in the ordinance of the police jury and afterward by a map deposited at the courthouse, of which it is conceded the voters of the district had notice. The notice of election referred to this map and the ballots also.

The canal which was to form part of the southern line was a canal proposed at the time that the ordinance was adopted and its course was well known, and it, as well as the limits of the arable land are *noted* enough of the boundaries, to prevent uncertainty as to the limits of the drainage district.

A PPEAL from the Twenty-third Judicial District, Parish of St. Mary—*Allen, J.*

D. Caffery & Son, for Plaintiff, Appellant.

Mentz & Borah, for Defendant, Appellee.

On rehearing by BREAUx, J.

The opinion of the court was delivered by

PROVOSTY, J. The plaintiff, an owner of property within the limits of the defendant drainage district, enjoins said district from levying a tax and from issuing bonds.

The two first grounds of injunction may be stated together. They are to the effect that the tax which defendant has undertaken to levy, and the bonds which defendant has undertaken to issue are those provided for in Article 281 of the Constitution; and that this Article not being self-operative, its provisions can be taken advantage of only by following the provisions of Act 12 of 1900, passed to make it operative; and that defendant has not even attempted to follow the provisions of said Act.

It is true that defendant has not pretended to follow the provisions of said enabling Act, but we do not think it was necessary to do so. Act 37, under which defendant is organized, contains provisions for the holding of such an election as is required by Article 281, and the Article itself, after conferring directly the authority to levy the tax

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and to issue the bonds, goes on to make provision on all essential points. Act 37 makes no mention of bonds, and in a certain sense, therefore, it makes no provision for holding an election to consult the taxpayers on the issuance of bonds; but Article 281 evidently contemplates that the machinery for the issuance of the bonds shall be the same as for the imposition of the tax and for the latter Act 37 does make provision.

The third ground of injunction is that the limits of the district are not fixed with sufficient certainty.

The necessity for fixing with certainty and precision, the limits of a district empowered to levy a property tax especially when the tax must be voted for, needs but to be mentioned to be recognized. Unless the limits are thus fixed it is not possible to know with certainty what property is taxable and what persons may participate in the elections, and certainty on these points is as essential as on the rate of the tax, or on any other feature of the taxing scheme. The authorities cited by plaintiff are conclusive to the effect that the limits of a municipality must be fixed with certainty and precision. *Dillon Mun. Corp.* (4th Ed.), Sec. 182; *A. & E. Ency. of L.*, Vol. 15, p. 1001 (1st Ed.); *Cutting vs. Stone*, 7 Vt. 471. It is not true to say that because these authorities have reference to municipalities they are not applicable. The reason why the limits of a municipality must be fixed with certainty is that a municipality is called upon to exercise the governmental powers of taxation and police; and of these two powers the one most liable to abuse and most needing to be hedged in by metes and bounds, is the very one that defendant is empowered to exercise, namely, that of taxation. The authorities, therefore, apply with full force to defendant.

The ordinance fixing the limits of the defendant drainage district, reads, as follows:

"The said district to embrace and comprise that part of the Parish of St. Mary described as follows, to-wit:

"North by a line on the south side of Bayou Teche, located on the summit of the ridge which divides the waters that flow into the Teche from those that flow back from the various small sloughs to the swamp on the South; east by a line on the east side of Bayou Choupique (not Yokely) situated on the summit of the ridge which divides the waters that flow into Bayou Choupique from those that flow into Bayou Yokely; south by the proposed canal itself, or, where the canal does not

extend, by the limit of the arable lands; west by a line on the east side of Bayou Cypremort on the summit of the ridge which divides the waters that flow into Bayou Cypremort from those that flow back through the various small sloughs to the swamp on the south.

"These lines are to be drawn so as to comprise all the lands whose waters will naturally flow into the proposed canal, and no other. The approximate location of the canal will be from a point in Bayou Choupique near Sabin Rodriguez's plantation running in a westerly direction through the marsh and swamp, connecting with all the slough and drainage ditches from the high lands on the north, until what is known as the Bodin Canal on the west boundary of L. P. Patout's property is reached. Then on some point on this canal, to be determined later on an outlet will be cut into the most feasible one of the several marsh bayous which leads to the gulf.

"At the point where the canal crosses the right of way for water left open by L. P. Patout, a branch canal is proposed to be dug in a northerly direction, crossing the cypremort branch of the Southern Pacific Railway, and extending across the public road at Arnod's Lane, and leading into the low lands north of the road."

Under the maxim, *id certum est quod certum reddi potest*, the north, the east and the west boundaries of the district may be held to be fixed with sufficient certainty by this ordinance. We have to assume that the ridges in question are continuous, and that the location of the line of their summit is a matter of mere engineering skill. But the southern boundary is fixed neither by reference to landmarks nor by the adoption of a line such as would need only to be located by a civil engineer; it is stated that the line is "to be drawn"; and that its starting point shall be "near Sabin Rodriguez's plantation"; and that its course shall run in a westerly direction until the canal on the west boundary of L. P. Patout's plantation is reached; and that the line in the parts not thus marked shall be along the limit of the arable lands. That this prescription of limits is too vague, is perfectly plain.

The discretion confided to the Police Jury for the fixing of this boundary has to be exercised by the Police Jury itself, and cannot be delegated by it to some other functionary. This is elementary.

Defendant contends that plaintiff has no interest in raising this question of the indefiniteness of the boundary, because his land is admitted to be within the district. We cannot see the force of this contention. Plaintiff is not trying to exclude his property from the

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district, but is objecting to an illegal tax. He has a direct interest. The proposed tax and the proposed bond issue, if illegal, operate as a cloud upon his title, which he has a right to remove. The fixing of this boundary will determine legally what property must share with his in the expenses of the district; it may determine also whether certain voters are inside or outside of the district and have or not a right to participate in the elections, etc., etc. For these reasons, and probably for others, he has an interest in contesting this question.

As to the fourth ground, all we need say is that a drainage district created under Act 37 of 1894 must conform to Section 3 of that Act in respect to the necessity of consulting the taxpayers when new drains are to be cut and opened. Act 12 of 1900 dispensed from that necessity only the districts organized under its own provisions. By its express terms, Section 16, its provisions are not to affect drainage districts not organized under itself.

The prescription pleaded by defendant is inapplicable to the irregularities on the score of which the injunction is maintained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be set aside and that the defendant herein be enjoined and prohibited from levying the tax and issuing the bonds, provided for in the ordinance recited in the plaintiff's petition herein, and that the said defendant pay the cost of this suit.

ON THE REHEARING.

BREAUX, J. We, on the rehearing, take up for decision the point of disagreement between plaintiff and defendant regarding the southern boundary of the drainage district.

All the issues heretofore were decided adversely to the plaintiff, except the one relating to the south line of the Cypremort Drainage District. This line, on examination, does not seem uncertain to an extent that it cannot be traced and made sufficiently certain and enable interested parties to determine the extent of the lands in the district. A map before us greatly assists in our reconsideration of the question. It (this map) construed with the ordinance fixing the boundaries warrants the conclusion that the south line is capable of being made certain.

The statute has delegated to the Police Juries the power to divide their respective parishes into districts and to fix their limits. In the exercise of that power, the Police Jury in this case has designated the

boundaries. The court in the opinion handed down found the north, east, and west boundaries sufficiently certain. With the assistance of the map the southern boundary appears to us as certain as those first mentioned above. If the designated ridges and other natural marks along the front and two sides are boundaries enough, the rear line has as many points to sustain it.

This line must be drawn to include the lands, to quote from the ordinance, "whose waters will naturally flow in the proposed canal and none others." This condition secures to each land owner the assurance this his land is to be drained by the projected canal. The land owner can compel the enforcement of the laws so as to share in the proportionate benefit of the drainage. If this condition be carried out in all the drainage districts the law will not fail in its purpose and great good will be accomplished. But this assurance to each owner of benefit to be received in return for the taxes paid of itself would not be a sufficient compliance as there must be boundary lines in addition. The ordinance orders that the limits of the arable lands are to be taken as the basis for the south line where the canal does not extend.

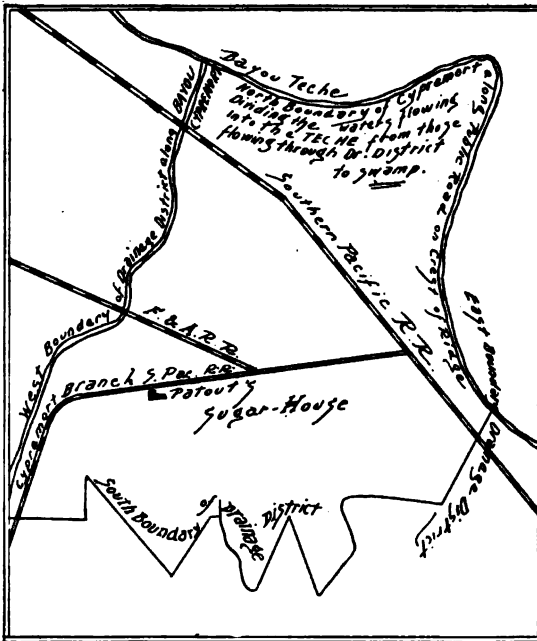
We notice that the rear line is anything but straight, a fact due, we infer, to the necessity of avoiding the very low marshes near the coast of the gulf and of draining the higher lands.

The principal drains, as we understand, are to be opened from the north to the south line. This line is to touch the western terminus of the drain and where it does not extend as far south as needful to effect the drainage intended, there it is to follow the limit of the arable lands. This is not as clear as it might have been, yet it can, we think, be located with reasonable certainty. There are other descriptions in the ordinance that are confusing. We have sought to find the meaning of the ordinance as relates to the south line by interpreting only the phrase "south by the proposed canal itself, or where the canal does not extend by the limits of the arable lands," and construing it with the whole evidence, we have concluded not to set aside the ordinance as null and void.

The evidence shows that the voter knew of the map to which we have before referred. In the election notice which was published for thirty days, it was stated that bonds were to be issued and the proceeds applied in constructing a system of drainage in the district to be delineated in accordance with the map which was circulated in the district and made known to the voters.

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The plaintiff's contention is that although, as he concedes, the taxpayers by voting the tax countenanced the system of drainage advertised as before mentioned and sanctioned to some extent at least the method followed by the use of a map to indicate lines, yet that this is not to be considered in the light of a ratification, for the statute contemplates a form to be followed from which there should not be any material deviation; that the manner of opening the drains had not been matured nor the location of the drain fixed as required by vote. As a condition precedent it was necessary to fix the limits. We think this was done to an extent sufficient to make all parties concerned aware of the lines as well as of the location of the drains. That this information was given by the ordinance, the advertisements, and the maps. Besides, the evidence discloses that it was impossible to describe the location and extent of the drain in a printed ballot, but that they were minutely described on a map, made by the secretary of the Drainage



Board, who is a surveyor by profession. This is sufficient compliance with the law as relates to description of location of districts and drains.

We are warranted in concluding that every voter was notified of the location of the canal, the drains to it, and of the limits of the district.

In leaving the subject, we must say that while there was not a map like distinctness of trace in the ordinance in question of the Police Jury, there is sufficient description of the district to sustain the boundaries as described. We annex a skeleton sketch of the district for reference.

It is, therefore, ordered, adjudged and decreed that plaintiff's action be and the same is hereby dismissed, the injunction dissolved and plaintiff's demand rejected.

It is further ordered, adjudged, and decreed that the legality of the defendant organization is hereby recognized and that it was organized in accordance with the laws and the constitution and that it has the right and authority conferred on drainage district organizations.

PROVOSTY, J., dissents, holding that the boundaries of a taxing district must be fixed by the ordinance itself creating the district.

No. 13,973.

MRS. MARY E. HUGHES AND HUSBAND VS. THE HEIRS OF BIRNEY ET AL.

SYLLABUS.

1. It is held that the doctrine of reappearance of land after submergence is the one that controls the case, and that the principles governing the acquisition of land by accretion, or dereliction, are not directly determinative of the controversy, though having a bearing upon the same.
2. If, after submergence, the water disappears from the land, either by gradual retirement, or by the elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation, extent, quantity, or boundary lines, the proprietorship returns to the original owner.

IN RE. Mary E. Hughes and husband applying for *certiorari*, or writ of Review, to the Court of Appeal, Second Circuit, State of Louisiana.

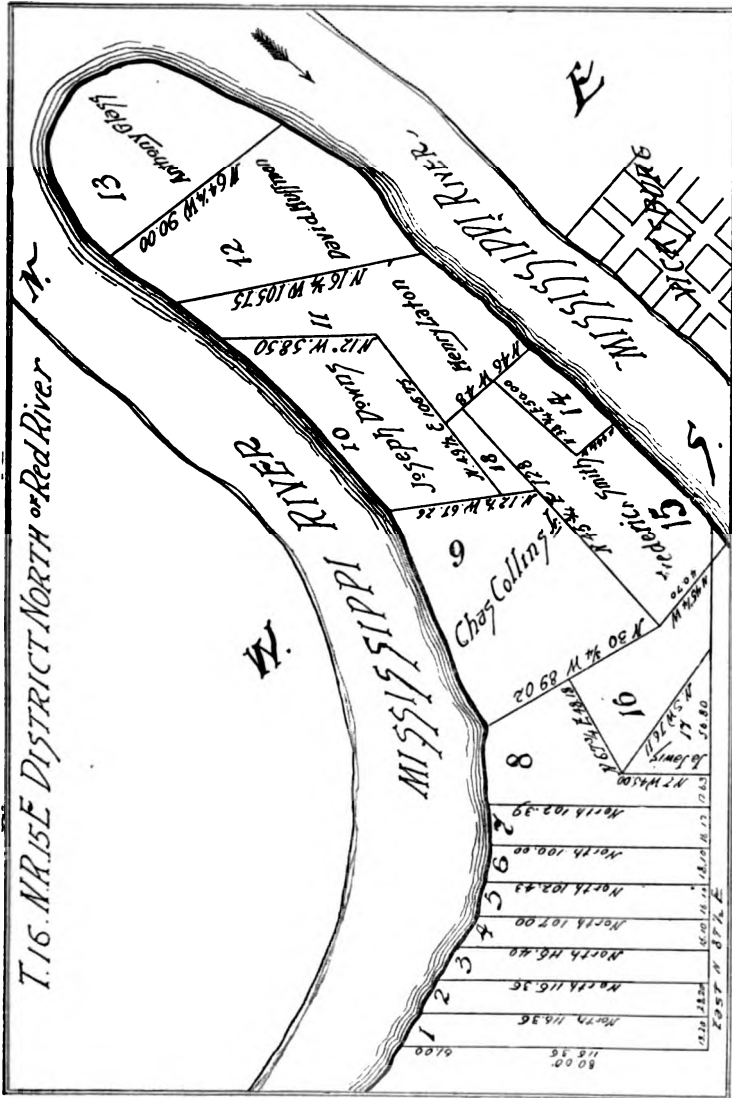
Wade R. Young, for Applicants.

Dabney & McCabe, *A. L. Slack*, and *William M. Murphy*, for Respondents.

The opinion of the court was delivered by

BLANCHARD, J. What is known as DeSoto Point on the Mississippi river in Louisiana was a long, narrow tongue of land, opposite and across the river from the town of Vicksburg in Mississippi.

The river flowed around this tongue in a serpentine course, making a great bend somewhat like an ox-bow, and coming down past Vicksburg, as shown by the appended sketch, taken from a government survey made in the early days.



This tongue of land was included in township 16 north, range 15 east, and was subdivided (presumably at the time of the government survey alluded to) into fractional sections as shown on the first sketch.

The authors of plaintiff's title appear to have acquired Sections 10 and 12 containing, respectively, at the time of the survey, 502.25 and 459.50 acres; and the authors of defendant's title Sections 11, 14, 15 and 18, containing, respectively, 524.14, 94.86, 453.69 and 38.25 acres.

The river, by erosion, in the course of time, encroached upon the upper side of the point, gradually wearing it away until, practically, all of Section 10 had caved into the river and disappeared, and of Sections 11 and 12 all had gone into the river except a narrow strip on the lower side of the point.

There had been little or no change in the river line of Sections 11 and 12 on the east or lower side of the point.

This was the situation at the beginning of the year 1876. In the spring of that year the river broke through the narrow strip of land and made for itself what is called a "cut-off."

It broke through about the center of Section 12, as shown on the second sketch, which roughly delineates DeSoto Point as it appeared in 1876.

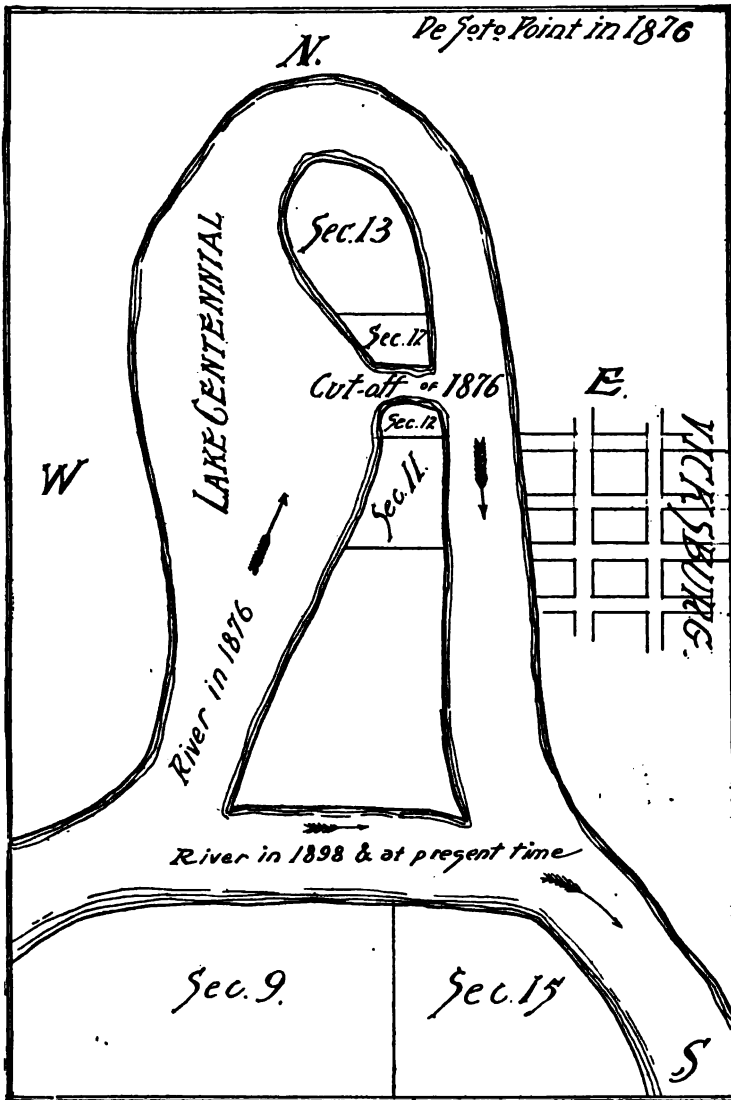
The river thus made for itself a new channel and its old bed became "Lake Centennial."

Having made this new channel, it proceeded to widen the same by caving away the land on the south or lower side of the "cut-off." In this way all that remained of Section 12 south of the "cut-off," all of Section 11, not previously lost by the erosion which had taken place on the upper side, probably all of fractional Sections 14 and 18, and the northern portion of Section 15, were washed away. That is to say, the surface of said tracts was washed away; the river went over them; they became submerged.

The tendency of the river was southward. It did not remain in the channel at the "cut-off," where it first went through the strip of land forming DeSoto Point. It seemed to be making an effort to straighten itself at that locality.

Pursuing this object, it wore away all the land south of the "cut-off" to or near the foot of the Point, and then established its permanent channel across the lower portion of the Point, as shown on the second sketch.

Thus was a large part of the center and lower portion of what had



once been DeSoto Point covered by the river, and what remained of that Point above water was (1) the extreme upper or northern part thereof, now become an island, and embracing fractional Section 13 and a narrow strip of Section 12 adjoining Section 13; (2) the ex-

treme lower or southern part thereof, embracing part of Section 9 and the southern two-thirds of Section 15, which now had a front on the river on the west side thereof.

The evidence shows it took the river, approximately, eight months, from the time it made the "cut-off," to erode its way from that point to what was its position in 1898 when this suit was tried in the District Court.

Having established its permanent channel, as shown, across the lower part of DeSoto Point, the river began to fill, with its silt, the stretch of water lying between its channel and the place where it had first broken through the strip of land. This was in point of distance about one mile.

This filling, or deposit, continued until, now, from the "cut-off" to the present channel of the river, there is a solid body of land raised above the water, susceptible in places of habitation and cultivation.

That land is the subject of controversy in this suit. It embraces parts of the old bed of the river on both sides, and what was (by the government survey made in 1828) fractional Sections 10 and 11, all of fractional Section 12, except the strip of same left by the "cut-off" on the northeast adjoining Section 13, fractional Sections 14 and 18, and the upper part of Section 15, except that these three fractional Sections last mentioned, or parts of them, and, perhaps, part of what was once Section 10, have supplied in whole or in part, the present permanent channel of the river across the lower portion of the Point, as shown on the second sketch.

The plaintiff claims the whole of this "made" or "raised" land, under Art. 509 of the Civil Code, on the ground that it is an alluvial formation, attached as accretions to that portion of Section 12 on DeSoto Point (now DeSoto Island) which adjoins Section 13, and which remained after the river broke its "cut-off" through there in 1876.

Her suit is petitory in character. From an adverse judgment in the District Court, she prosecuted an appeal to the Court of Appeals, Second Circuit, and being cast there, has obtained a writ of review for its consideration here.

But our conclusions on the facts and the law of the case are no more favorable to her contentions than were those of our brothers of the other courts.

We learn from the testimony that what is now the land in contro-

very manifested itself as a bar under the surface of the water in about a year after the "cut-off" occurred. The discovery was made by a Cincinnati boat running aground. This was the first intimation or evidence a bar was forming there. By 1879 it was showing up above low water, and continued to rise higher and higher until it became dry land, even when the river was full, from where the "cut-off" had been to the present channel.

It thus appears that that portion of DeSoto Point the surface of which the river cut away when it was forming a new channel for itself has been restored.

The land—the same fractional sections which defendants or their authors owned—is there now. It was a case of temporary submergence. The river went over it and in doing so carried away its surface to about the usual depth of the river at that point. But the river did not remain upon the land. It settled itself in a permanent channel south of it, and then proceeded to uncover the land it had passed over. It did this by its deposits and withdrawal of its waters. Dry land at the same place as before the submergence is there now, susceptible of survey and identification as per the original lines of the government survey. Indeed, it was surveyed under order of court in this very case and the old lines in part run out.

Under these circumstances, we hold that title to the fractional sections which defendants' authors acquired did not pass from defendants by reason of the river going over the land and occupying it for a time.

Ownership of soil carries with it the ownership of all that is directly above and under it. C. C. 505. The ground upon which the river rested temporarily in going over that portion of DeSoto Point never ceased to belong to defendants—the heirs of Birney—and the deposits placed upon it by the river in retiring from it, having been put upon land belonging to them, became likewise their property.

The evidence shows that the deposits first began at the lower end of the land in dispute, near the present channel of the river, and gradually extended up towards Section 12, or what remains of it, at the foot of what is now DeSoto Island. That is to say, the highest part of the restored land is at the lower end, on the east side thereof, and it gets lower as it extends northward and westward.

It is shown that at high stages of water in the river boats may circle, or circumnavigate the land in controversy. The Federal Gov-

ernment dredged a canal from the present channel of the river, along the Mississippi shore, to enable boats to reach Vicksburg, and a depression or channel along side of what remains of Section 12, filled with water when the river is high, enables them to pass around the northern end of the restored land and back to the river again through what is called "West Pass" on the west side. At low stages of water, however, these passes around the northern and western sides of the restored land are dry.

It would seem, therefore, that the land in controversy is hardly to be considered as accretions formed to the soil of that portion of Section 12 left above where the "cut-off" had been.

We are of the opinion that the doctrine of reappearance of land after submergence is the one that controls here, and that the principles governing the acquisition of land by accretion, or dereliction, are not directly determinative of the controversy, though having a bearing upon the same.

In Gould on Waters, 2nd Ed., Sec. 158, it is said:—

If navigable waters, owned by the State, suddenly encroach upon private lands adjoining, and there are marks by which their limits can be determined, the title to the soil thus covered remains in the former owner, and upon the recession of the water it is restored as his property.

The author cites many authorities in support of this proposition, among them Sir Mathew Hale's *De Jure Maris*, Woolach on Waters, 22, 37, and Mulroy vs. Norton, 100 N. Y. 426 (found also in 53 Am. Rep. 206.)

In the case last referred to it was held that:—

If, after a submergence, the water disappears from the land either by its gradual retirement, or the elevation of the land by natural or artificial means, the proprietorship returns to the original owner. No lapse of time during which the submergence has continued bars the right of the owner to enter upon the land reclaimed and assert his proprietorship when the identity can be established by reasonable marks, or by situation, extent of quantity and boundary on the firm land.

See also Angell on Tide Waters, 1st Ed., 77; *St. Louis vs. Rutz*, 139 U. S. 226; *Nebraska vs. Iowa*, 143 U. S. 359.

The true solution of this dispute is to have the old lines of Sections 10, 11, 12, 14, 15 and 18 run out as near as can be on and over the restored land and let plaintiff, Mrs. Hughes, and the defendants, Heirs

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of Birney, take such land as may be found within the limits of the Sections owned by them respectively.

It is, therefore, ordered that the judgment of the District Court and that of the Court of Appeals be set aside, and it is now adjudged and decreed that this case be remanded to the District Court in and for the Parish of Madison for further proceedings according to the views herein set forth and the law—costs of all the courts up to this time to be borne by plaintiff; subsequent costs relating to the survey and division of the land to be borne by plaintiff and the heirs of Birney equally.

Rehearing refused.

No. 14,234.

MARIE LOUISE GRAY VS. E. BOURGEOIS, TAX COLLECTOR.

SYLLABUS.

1. The General Assembly has the constitutional right to fix a period beyond which actions attacking the legality and regularity of special elections held under the provisions of Articles 281 and 232 of the Constitution shall be barred.
2. Section 17 of Act No. 5 of 1899 has not been repealed by either Act No. 12 or Act No. 114 of 1900.
3. It is not necessary at a special election held under Articles Nos. 281 and 232 of the Constitution seeking to obtain from the property taxpayers of a town, authority in municipal authorities to incur a debt for designated purposes, and to secure payment of the same by the levy of a special tax, that the debt to be incurred for each particular purpose should be specially set out. Application of the tax funds in detail inside of the purposes for which they were authorized, is left to be controlled by the discretion of the authorities.
4. Should the municipal authorities attempt to apply the special tax to the payment of debts created anterior to the authorization granted them, or for debts incurred for purposes not authorized by the Constitution, the same may be prevented by the remedy of injunction.
5. Under authority granted by the taxpayers of a town, to incur debt, to the municipal authorities thereof, and to issue bonds to represent same, and to secure the debt and bonds by a special tax, the authorities may, without issuing bonds at all, create a debt for the purposes stated, and levy a special tax within the constitutional limit, if it be more advantageous and advisable to do so. The bond issue is authorized merely in aid of raising the money needed for the purposes stated.
6. When the property taxpayers of a town at a special election have authorized the town authorities to incur a debt of ten thousand dollars, and interest, and authorized the levying of a special tax of five mills for ten years on the valuation and assessment fixed by the Constitution, the authorization is null and

107	671
110	188
110	189
107	671
112	788
107	671
119	148
107	671
125	133
125	612

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void in so far as the debt and interest authorized to be incurred exceeds the special tax which is authorized to be levied to pay the debt and interest. Each year's instalment of debt and interest must correspond with that year's special tax. The authorization granted is not void in its entirety, but debts and interest incurred under it must be scaled or pruned down.

A PPEAL from the Twenty-third Judicial District, Parish of St. Mary—*Allen, J.*

Charles A. O'Niell, for Plaintiff, Appellee.

Charles L. Wise (Foster, Milling, Godchaux & Sanders, of Counsel), for Defendant, Appellant.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff alleged that the defendant, tax collector of the town of Morgan City, had seized and advertised for sale certain described property of hers in that town in enforcement of a certain illegal tax of five mills on the dollar, assessed by the municipal corporation of Morgan City in 1901.

That said tax was illegal, unconstitutional, null and void, and the manner of attempting to enforce the sale was illegal, informal and irregular, and she was entitled to a writ of injunction restraining and prohibiting said collector from collecting said tax for this:

"(1) That the said special tax is pretended to have been levied according to the provisions of Article 281 of the Constitution of this State, and the notice of election provided for in that article was not published for thirty days, as required; that the ordinance calling said election was only adopted on November 16th, 1900, the first publication was made on November 24th, 1900, and the last publication on November 15th, 1900, and even if the said publication had been made on November 17th—i. e., the first issue of the paper after the ordinance was adopted—thirty clear days would not have elapsed before the election."

"(2) That the said tax is pretended to have been levied to pay for certain bonds in principal and interest, and the said town of Morgan City has never issued nor negotiated said bonds with interest, according to the assessed valuation of the property in said town."

"(3) That the notice of said election and the ordinance calling for

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the same do not state the amount to be devoted to any one object, and states various objects confusedly."

"(4) That at least one of the objects stated in the notice of election and the ordinance calling for same is illegal and unconstitutional, it being stated therein that it is for the purchase of a steam fire engine, when in fact the said fire engine had already been purchased by said corporation many months before the said ordinance was adopted calling for said election, and the corporation notes had been issued in payment of said engine, and the debt had already been contracted."

"(5) That, on account of the illegalities in the said bonds (especially these hereinabove recited), and because of the fact that the tax is inadequate to pay same, and unconstitutional, null and void, the said municipal authorities cannot, and will never, negotiate said bonds; that therefore the said tax has not been pledged to pay said bonds, and is not being devoted for the purposes stated in the publication aforesaid; and that, in fact, the proceeds of said tax have been partially at least used for paying a debt which was in existence and had been contracted before the call for the election was made, or the ordinance adopted."

"(6) That the publication of the notice of sale of said property has not been published for the length of time required by law, and will not be published hereafter, because the office of the newspaper in which it has appeared has been destroyed by fire. She averred that she was entitled to a writ of injunction restraining and prohibiting said tax collector of Morgan City from selling said property. She prayed that the tax collector be cited to show cause why a writ of injunction should not issue, restraining and enjoining him from collecting the said tax; that on trial of the rule the writ of injunction issue, that said writ be maintained, and the said tax declared and decreed absolutely null and void."

The court ordered the rule to issue.

The defendant excepted that the town of Morgan City was a necessary party. Under reservation of the exception defendant answered the rule, pleading first the general issue. He maintained the validity and legality of the tax. He averred that the tax was levied by the proper authority, after all the requirements of law had been complied with. He averred that plaintiff having become delinquent he (tax collector), after complying with the formalities of law, had legally advertised said property for sale, and the advertisement was legal.

The District Court held that it had been proved that the special election held in the town of Morgan City on December 17th, 1900, was held on the thirtieth (30th) day from the first publication of the notice of election and that same was therefore not preceded by the thirty (30) days for publication required by the Constitution and laws of the State.

It therefore adjudged and decreed that an injunction issue as prayed for, restraining the enforcement of the tax until further orders.

Defendant answered on the merits, reiterating the allegations he had made in his answer to the rule.

The court rendered judgment for the same reasons which it had assigned for issuing the injunction prayed for by the plaintiff, adjudged and decreed the special tax of five mills levied at said special election on November 17th, 1900, on all property subject to taxation within the said corporation of Morgan City, was unconstitutional, null and void, and made perpetual the injunction which had been issued.

The tax collector appealed.

Appellant pleads in the Supreme Court the prescription of six months, alleging that the action instituted by the plaintiff was instituted more than six months from the date of the promulgation of the result of the special election held on the 17th day of December, 1900, at which election the special tax, the collection of which is hereby enjoined, was voted,—all of which appears upon the face of the record herein filed; that the right to contest the validity of said election and said taxes voted at said election must be asserted within six months from the date on which the result of said election is promulgated, or the right to institute such an action is barred; that, as said plaintiff and appellee allowed more than six months to elapse from the date on which the result of said election was promulgated, her right of action as set forth in her petition is prescribed by the lapse of six months, and defendant and appellant therefore pleads in bar of plaintiff's action the prescription of six months.

In view of the premises defendant and appellant prays that the plea of prescription herein filed be sustained; that the demand of appellee be rejected at her cost, and for general relief.

On the 17th of December, 1900, a special election was held in the corporation of Morgan City by virtue of an ordinance of the Common Council of that town, adopted on the 16th of November, to take the

sense of the property taxpayers of Morgan City as to whether the said municipal corporation should be authorized:

1st. To incur a debt of ten thousand dollars for the purchase of a steam fire engine and hose cart, for the construction and erection of a suitable building to house said apparatus, and for the construction and erection of a public market building in and for said town, the title of which shall vest in said municipality.

2nd. To issue negotiable bonds aggregating ten thousand dollars in principal, running through a period of ten years and bearing interest at the rate of five per cent. per annum from their date to represent said indebtedness; each of said bonds to be of a face value of one thousand dollars and numbered from one to ten, respectively, payable at the following periods of time, to-wit: One bond of one thousand dollars shall mature and be paid on the first day of March in each year, for a period of ten years, commencing March 1st, 1901, and that the interest shall be paid on the 1st of March, in each year, commencing March 1st, 1901, upon the whole of the bonds remaining unpaid.

3rd. To levy, assess and collect for and during each of the years 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908 and 1909, a special tax of five mills on the dollar, of the assessed valuation in each year, of all the property in the corporate limits of said town, subject to taxation under the laws of this State, to pay the said bonds and interest.

Three commissioners were appointed by the Common Council to serve at the said election. The ordinance under which the election was held provided that due publication of the ordinance and notice of said election be made by the mayor in the official journal of the town of Morgan City for thirty days preceding such election as by law required. On the 19th of December, 1900, the three commissioners, in presence of three witnesses, met for the purpose and compiled the returns sent in by the commissioners of the Morgan City precinct, and in their return or *proces verbal* of compilation declared that having compiled the returns sent in by the commissioners of the said town, they found that there were cast for the proposition aforesaid sixty-five votes and there were cast against the proposition six votes.

That the amount of the assessed value of the property voted for the proposition was *seventy-eight thousand seven hundred and forty dollars* (\$78,740) and the amount of the assessed value of the property voted against the proposition was three thousand eight hundred and ninety dollars (\$3,990). The mayor of Morgan City promulgated the

result of the election on the 24th of December, 1900. On the 26th of December, 1900, the Common Council met, the declared object of the meeting being "to carry out the levying and collecting of the special tax for improvements, approved by the taxpayers." An ordinance was then adopted entitled "An ordinance to incur a debt of ten thousand dollars, to issue interest-bearing negotiable bonds therefor, running through a period of ten years, and to levy, assess and collect a special five-mill tax on all property in the limits of the town of Morgan City to pay said bonds in principal and interest, pursuant to authority and power granted by the property taxpayers at the special election held on December 17th, 1900, under Article 281 of the Constitution of 1898, and Act No. 114 of the Acts of 1900 of the State of Louisiana."

The ordinance, following the language of the proposition voted on by the taxpayers, ordained that the corporation of Morgan City incur a debt of ten thousand dollars, for the purposes stated (stating them); that interest-bearing negotiable bonds be issued to represent said indebtedness aggregating the sum of ten thousand dollars in principal, running through a period of ten years, and bearing interest at the rate of five per cent. per annum from their date, each of said bonds to be of the face value of one thousand dollars, and numbered from one to ten respectively; one each of said bonds to mature and become payable on the 1st day of March of each and every year for a period of ten years, commencing in the year 1901; that the interest shall be paid on the 1st of March of year commencing 1st of March, 1901, upon the whole of the bonds remaining unpaid; that to pay said bonds in principal and interest a special tax of five mills on the dollar of the assessed valuation in each year of all the property within the corporate limits of the town, subject to taxation under the laws of the State, shall be levied, assessed and collected for and during each of the years from 1900 to 1909, both inclusive.

That the tax collector keep a separate account of all the taxes collected under the ordinance, and that they be deposited with the town treasurer and by him deposited in a special account and shall be devoted exclusively to the purposes set forth, and the town treasurer be prohibited from making any disbursement of the said taxes except for the purposes stated.

In the record is an affidavit and certificate of the assessor of the Parish of St. Mary, of date December 26th, 1900, to the effect that the assessment of the town of Morgan City for the year 1900, amounts to

the sum of two hundred and thirty-eight thousand seven hundred and five dollars; that this assessment is the basis of the five-mill levy for a bond issue of ten thousand dollars, authorized and ordered to be issued by the town of Morgan City, at a special election held for that purpose on December 17th, 1900, and that five-mills on the dollar is levied and assessed on said assessment of two hundred and thirty-eight thousand seven hundred and five dollars, and that upon this assessment the five mills levied will be collected for the purposes named in the ordinance of the town of Morgan City, to-wit: the discharge of the principal and interest of the bond issue of ten thousand dollars.

The petition in the present suit was filed on the 8th of July, 1901, *more than six months after the promulgation of the election returns.*

From the allegations of the petition it appears that the special tax for the year 1900 was in process of collection by the town tax collector when the present suit was instituted, as its object was to stay by injunction the sale of plaintiff's property, which had been seized and was about to be sold in enforcement of the same. The suit is therefore a collateral attack upon the election proceedings in aid and support of her individual resistance of the tax upon her own property. The tax is primarily sought to be decreed unconstitutional, null and void to effect that object, though plaintiff's prayer is general and sweeping.

Article 232 of the Constitution declares that no municipal tax for all purposes whatsoever shall exceed in any one year ten mills on the dollar of valuation, providing that for giving additional support to public schools and for the purpose of erecting and constructing public buildings, public school houses, bridges, wharves, levees, sewerage work and other works of public improvement, the title to which shall be in the public, * * * any municipal corporation may levy a special tax in excess of said limitation whenever the rate of such increase and the number of years it is to be levied, and the purposes for which the tax is intended shall have been submitted to a vote of the property taxpayers of such municipality entitled to vote, under the election laws of the State, and a majority of the same in numbers and in value, voting at such election shall have voted therefor."

This article of the Constitution was followed by Article 281, which declares that "Municipal corporations * * * when authorized to do by a vote of a majority in number and amount of the property taxpayers qualified as electors under the Constitution and laws of this

State, voting at an election held for that purpose, after due notice of said election has been published for thirty days in the official journal of the municipality, and when there is no official journal in a newspaper published therein, may incur debt and issue negotiable bonds therefor to the extent of one-tenth of the assessed valuation of the property within said municipal corporation as shown by the last assessment made prior to the submission of the proposition to the property taxpayers as above provided, and may be authorized by the property taxpayers voting at said election to levy and assess special taxes upon property, subject to taxation in the corporation, provided said taxes so imposed do not exceed five mills on the dollar of the valuation in any one year, nor run for a greater number of years than the number named in the proposition, submitted to the taxpayers. No bonds shall be issued for any other purpose than stated in the submission of the proposition to the taxpayers and published for thirty days as aforesaid, nor for a greater amount than therein mentioned, nor shall such bonds be issued for any other purpose than for paving and improving streets, roads and alleys, purchasing or constructing a system of waterworks, sewerage, drainage, lights, public parks, and buildings, bridges and other works of public improvement, the title to which shall vest in the municipal corporation, nor shall such bonds run for a longer period than forty years from their date, nor bear a greater rate of interest than five per cent. per annum, or be sold by the municipal corporation issuing same for less than par."

Several statutes were adopted by the General Assembly in enforcement of Article 281 of the Constitution, to-wit: Act No. 5 of 1899 and Acts 12 and 114 of 1900. Act No. 5 of 1899 not having fully covered the subject-matter it was dealing with, Act No. 12 was passed in 1900 and was evidently designed as a supplement thereto, with some alterations or modifications of the former act. By its title it provided for the repeal of all laws or parts of laws conflicting therewith, so far as they *appertained to drainage* districts.

Section 18 of the act—the repealing clause—declared that all laws or parts of laws appertaining to *drainage* districts contrary to and inconsistent with the provisions of this act are hereby repealed, provided that all laws or parts of laws which are applicable alike to drainage districts and other corporations provided for by the Constitution or laws of Louisiana, shall in no manner be affected by the provisions of this act, in so far as they relate to the other corporations above referred to.

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Act No. 114 of 1900 declared one of its purposes to be "to repeal all laws contrary to or in conflict therewith."

Section 9—the repealing clause of the act—declared that all laws or parts of laws contrary to or in conflict with the provisions of the act, be and the same are hereby repealed, especially Act No. 5 of the extra session of 1899, and that this act take effect from and after its passage.

This court has held that under the title of this act, Act No. 5 of the extra session of 1899 was repealed only in so far as its provisions were "contrary to or in conflict" with the provisions of the last mentioned act.

The 17th section of Act No. 5 of 1899 declared that "from and after a delay of six months from the date of the promulgation of the result of any such election no one shall have any cause of action to contest the regularity, formality or legality of the petition of taxpayers for the calling of any election herein provided for, of the ordering of the same, of the notice of same, of the holding of same, of the returns thereof, of the examination and count of the ballots, of the examination and canvass of the returns, of the declaration of the result, or of the promulgation of the result of any such election, and that after such delay all such causes of action should be prescribed."

This prescription the defendant has invoked. Plaintiff contends that Section 17 of Act No. 5 of 1899 was repealed by the later acts of 1900 and should this be not the case, then that section is inoperative or unconstitutional in view of the fact that the requirement of the notice which must have preceded the election was a "constitutional mandatory requirement," the force of which could not be broken by the legislature, directly or indirectly."

OPINION.

We are of the opinion that Section 17 of Act No. 5 of the extra session of 1899 has not been repealed by either Act No. 12 or Act No. 114 of 1900. It has the same effect now as it had when enacted. The General Assembly did not attempt through that section to alter in any manner a constitutional requirement. It simply directed that all parties interested in the subject-matter of the elections provided for who had objections to urge against the validity or legality of the election, should advance them within a given fixed delay. The section was simply a statute of repose, a legislative estoppel against those particular objections being urged later as grounds of complaint.

Plaintiff is in error in supposing that the legislature was without power to work the estoppel to the extent it did. There is scarcely any right which a person has from which he may not cut himself off by his own action or inaction. The want of notice, as the position of third parties or rights of third persons may be involved, may be acquiesced in. The notice is a provision of law enacted for the benefit of and protection of particular persons or classes of persons and is not to be forcibly exacted, if in reality in some particular case it be not to their advantage.

They may waive their privilege to object should they think proper, and silence and inaction are declared expressly under our Civil Code to be "under some circumstances the means of showing an assent that creates an obligation." This statute in question simply fixes by law in this particular class of cases, the facts and circumstances which will be held to evidence "an assent" to what has been done.

Parties objecting in fact from the first to the election, or anything connected therewith, may by their attitude be thrown practically by the law into the list of those who originally concurred in and brought about the election. It has been repeatedly held that a person who has actively assisted in bringing about the passage of an act cannot subsequently question its constitutionality, and that one not injuriously affected by a statute cannot do so. So, also, a person voting affirmatively for the doing of a certain act, has been held estopped from subsequently contesting the act which was done (partially at least) by effect of his vote.

The statute of repose simply closes the door to inquiry on this subject and assumes that the party seeking to assail the act is one not entitled to raise that issue. An absolute loss of ownership is a much more serious loss than the loss of a right to resist the enforcement of a tax upon that property, and yet by statute law the owner exposes himself to the loss of his right of ownership in a thing if he permits it to remain in the possession of a third person for a time sufficient to enable the latter to acquire it by prescription. (C. C. 496-2015.)

If the right be lost, his own negligence and *laches* are the proximate cause of the same; he cannot urge that being guaranteed in the protection of his property by the Constitution it has been taken from him "without due process of law."

Cooley, in his work on Constitutional Limitations (chapter 7, p. 181, first edition), referring to attacks upon the constitutionality of a law, says: "There are cases where a law in its application to a particular

case must be sustained because the party who makes objection has by prior action precluded himself from being heard against it."

"Where a constitutional provision is designed for the protection solely of the property rights, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will. On this ground it has been held that an act appropriating the private property of one person for the private purposes of another, on compensation made, was valid if he whose property was taken assented thereto; and that he did assent and waive the constitutional privilege, if he received the compensation awarded, or brought an action to recover it. So if an act providing for the appropriation of property for a public use shall authorize more to be taken than the use requires, although such act would be void without the owner's assent, yet with it all objection on the ground of unconstitutionality is removed. And where parties were authorized by statute to erect a dam across a river, provided they should first execute a bond to the people conditioned to pay such damages as each and every person might sustain in consequence of the erection of the dam, the damages to be assessed as provided by the statute, it was held, in an action on the bond to recover those damages, that the party erecting the dam and who had received the benefit of the statute, was precluded by his action from contesting its validity, and could not insist upon his right to a common law trial by jury. In these and the like cases the statute must be read with an implied *proviso* that the party to be affected shall assent thereto; and such consent removes all obstacle; and lets the statute in to operate the same as if it had in terms contained the condition. In criminal cases, however, the doctrine that a constitutional privilege may be waived must be true to a very limited extent only. A party may consent to waive rights of property, but the trial and punishment for public offenses are not within the province of individual consent or agreement."

Another familiar instance of waiver or estoppel is when a party fails to invoke a constitutional right or privilege until after judgment has gone against him. The privilege or right has not been set aside, but lost simply because it has not been advanced.

Non constat in the case at bar that the plaintiff was not one of those who voted for the proposition. So far as the pleadings show, no one but the plaintiff objects to the result of the special election, the balance of the community desire the election to stand. She should not be per-

mitted in this collateral way to force matters to be set aside so far as they are concerned, and she should not be permitted to escape individual taxation and yet reap as a citizen of the town the advantages of the outlay of the money of the other citizens.

We are of the opinion that the exception of prescription is well taken against the attack upon the legality of the election of the 17th of December, 1900, and it is hereby sustained.

The sustaining of this plea leaves before us for consideration the other objections urged by the plaintiff. We will take them up, though not in the order in which they were made:

1st. She urges that her property was about to be sold in enforcement of the tax which she is resisting without thirty days' advertisement.

That is a matter which does not come before us in this case, the sole issue before this court being as to the constitutionality or legality of the tax.

2nd. She contends that the notice of election and the ordinance providing for the same do not state the amount to be devoted to any one object, but merely mention the various objects confusedly. Neither the Constitution nor the laws thereunder require a more than detailed statement of the purposes for which the debt was to be created or the tax applied than was given. The people by their vote seem to be satisfied to leave the application of the tax funds (inside of the purposes for which the tax was authorized to be levied) to the discretion of the Common Council.

3rd. That on account of the illegalities in the bonds and because of the unconstitutionality of the tax and its inadequacy to pay said bonds, the corporation cannot negotiate the same and has not been able to pledge the tax, and the proceeds of the tax are therefore being used to pay a debt of anterior existence.

These are mere allegations and tender no issue, except the last affirmative allegation that the proceeds of the tax are being used to pay a debt of anterior existence.

There is no evidence whatever in the record to support that averment and if this were true, it would authorize an action against the council for illegal diversion of the fund and a preventive injunction. This, however, would present a question entirely distinct from that of the legality and constitutionality of the tax. There is no evidence or claim that any debt has as yet been created by the Common Council under the authority granted to it by the taxpayers, and none that any

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bonds have yet been executed or that any endeavor has been made prospectively to negotiate them. If, under the circumstances of the case, bonds if executed could not be negotiated, it would be a very good reason for the council not to execute them at all. There is no obligation on the part of the council to do so; it is merely authorized, not obligated, to issue bonds.

Under the authority granted to it by the taxpayers it may, without issuing bonds at all, create debt within the constitutional limit and levy special taxes within the constitutional limit, if it be more advantageous to do so. The bond issue was merely authorized in aid of raising the money needed for the purposes stated.

4th. That the tax is pretended to have been levied to pay for certain bonds in principal and interest, and the said town has never issued nor negotiated said bonds, and in fact the said tax is inadequate to pay said bonds with interest, according to the assessed valuation of the said town.

In respect to this point, counsel of the plaintiff in their brief say:

"The second cause of nullity, that the tax is inadequate to meet the proposed bond issue, is destructive of the validity of the tax."

The total amount of the assessed valuation of all property situated in the town of Morgan City, for the year 1900, was \$228,705. The five mill tax on the valuation would be \$114.52½. The bond issue provides for ten bonds of \$1000 each, one of which is payable on the 1st of March, of each year, and the interest on the entire debt is payable annually on the same day. At the expiration of the first year the town would be compelled to pay \$500 interest, and one bond of \$1000, making a total of \$1500, at the expiration of the second year the town would owe \$1450, and the liability would thus decrease at the rate of \$50 per year, and not until the expiration of eight years would the tax be adequate to meet the debt incurred that year. During the eight years the deficit would accumulate to an extent that it would be impossible to finance the town. In the case of Callahan vs. Alexander, 52 Ann. 1013, municipal corporations are held to be absolutely prohibited from predicated the issuance of bonds upon an appropriation of any portion of the general fund tax. The special tax must be adequate to meet the bond issue and the bonds cannot be issued for any greater amount than the special tax will take care of.

Before examining this last point, it may be well to notice that no attempt has been made to have pledged or appropriated, in advance,

for the payment of the debt to be incurred, any portion of the taxes set aside for the alimony of the town, as was done in the Callahan case. If the town authorities had in view the application of a portion of those taxes to that debt, they evidently did not propose to do so until after the financial situation of the town in any given year had been first fixed.

The 23rd Section of Act No. 5, declares that all incomes derived from the public improvements purchased or constructed and all incomes derived from public markets, waterworks, or lights, when so set aside by the legislative body of the municipality shall, after the expenses and costs of maintenance of said improvements are paid for, constitute a trust fund to be devoted to the payment of the interest on the bonds so issued or the indebtedness so contracted, and any surplus after the payment of such interest shall be placed in the sinking fund (the sinking fund provided for by the 24th Section of the Act) to be used in the extinguishment of the principal of said obligations at maturity. Whether or not the town has any such income we do not know, nor can we know whether there ever will be such an income, and, if so, how much it will be.

We have no knowledge whatever of the financial condition of the town of Morgan City. We do not know whether it owes debts or not, whether it has issued bonds or not. If it owes debts, or has issued bonds, the fact does not appear in the transcript, but the plaintiff does not charge that the amount of debt which the town has been authorized to incur exceeds the constitutional limit of one-tenth.

Standing by itself, the limit of indebtedness has not been exceeded. The rate of taxation authorized by the taxpayers to be levied for the purpose of paying the debt which they authorized the municipal authorities to incur, is also within the constitutional limit of five mills. Though the proposition submitted to the taxpayers and voted for affirmatively by them conform, so far as the record discloses, to the letter of the expressed constitutional requirements of Articles 232 and 281 of the Constitution of 1898, a question arises none the less whether it be in fact constitutional as made and to the full extent made. The Articles of the Constitution while fixing a rate of the special taxation not to be exceeded and an amount of indebtedness not to exceed a certain amount relatively to the amount of the valuation of the taxable property of the town, they have not declared that the amount of the debt authorized to be incurred and the bonds authorized to be

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issued must, as to amount, fall inside of the fund provided for their payment through the special tax.

The fixed policy of the State has for many years prior to the Constitution of 1898 been adverse to the creation, by municipal corporations, of a floating unsecured debt. That policy found expression in the 2448th Section of the Revised Statutes, which declares that the Police Juries of the several parishes, and the constituted authorities of the incorporated towns and cities in this State, shall not hereafter have power to contract any debt or pecuniary liability without *fully* providing in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted."

We are not aware of any statute repealing this section of the law. We do not find any conflict between it and the provisions of the Constitution. They are not inconsistent provisions. In the case at bar the taxpayers of the town of Morgan City were solicited by the town authorities to authorize them to incur a debt of ten thousand dollars for certain purposes; this they consented to do, but at the same time, under and through the same proposition, they consent that the corporation issue bonds to the amount of ten thousand dollars with five per cent. interest from date, payable annually, an authorization varying materially from the authority to create a debt of ten thousand dollars; a debt of ten thousand dollars would stand fully provided for by the special five-mill tax, but the debt evidenced by bonds such as were authorized would not. For a portion of this amount they would be unsecured and unprovided for.

We are of the opinion that under the Articles of the Constitution cited, property taxpayers of a municipality are not warranted in authorizing the creation of an unsecured debt or unsecured bonds, but that the debt and bonds authorized, while conforming in other respects to the letter of the Articles, must be such as will be fully provided for as to principal and interest through the special tax provided for their payment; in other words that the debt should not exceed in amount the special tax which is authorized to be levied to pay it. The debt, with its interest, authorized by the property taxpayers of Morgan City to be created by its municipal authorities exceeds the special tax provided to meet it and to that extent their action is null, void and of no effect.

We have next to examine whether, under the language of the propositions as submitted to the taxpayers, and as then voted upon by them,

any portion of the debt can be created, or any bonds other than those specifically authorized to be issued, can be executed and issued. It will be seen that while the taxpayers authorized the creation of a debt of ten thousand dollars, they at the same time authorized the execution and issuing of certain bonds specially and minutely described as to dates, amounts, maturities and interest, etc., and authorized the levying of a special tax to pay such bonds. The authorities, instead of leaving certain details of the ordinance open to be accommodated to the conditions of a contract which they might find necessary or might be able to make, fixed them by anticipation, and the question is whether the authorities can alter the form of the bonds, their amounts, etc., etc., so as to "prune them down" (to use an expression easily understood) to conform to the debt legally authorized to be created by the taxpayers. We may state here that the debt which the authorities of Morgan City applied to the taxpayers to be authorized to incur, and which they were authorized to incur, was in reality one of ten thousand dollars, with legal interest thereon, as shown by the proposition submitted and voted upon.

We do not think that the authorization voted was null and void in its entirety from the mere fact that it attempted to convey a power greater than the taxpayers were competent to grant. The power granted should be held legal up to and within the amount of the special tax provided for as the means of paying the principal and interest of the debt to be contracted. *Oubre vs. The Town of Donaldsonville*, 33 Ann. 390. The authorities of Morgan City are authorized to act under the authorization as conferred upon them by the property taxpayers of the said election to incur debt and issue bonds as voted for to that extent, but no further.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed, that the judgment of the District Court overruling the exception of the prescription of six months levelled against plaintiff's attack upon the validity and legality of the election held in Morgan City on the 17th of December, 1900, referred to in the pleadings, be and the same is hereby annulled, avoided and reversed, and said exception of prescription is hereby sustained and plaintiff's demand in so far as it attacked the validity and legality of said election, be and the same is dismissed.

That there be further judgment decreeing null, void and of no effect, so much of the authorization granted by said property tax-

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payers at said election as authorizes the municipal authorities of Morgan City to incur debt and to issue bonds for an amount greater in principal and interest than will be secured as to payment of principal and interest by the special tax authorized by the taxpayers at said election to be levied to pay said debt and bonds. Plaintiff's demand against defendants is perpetuated to the extent of enjoining them from incurring debt or issuing bonds for an amount greater than said special tax will provide the means for paying both principal and interest.

It is further ordered, adjudged and decreed, that except in so far as judgment has been hereinbefore rendered in favor of the plaintiff, against the defendant, plaintiff's demand be, and it is hereby, rejected and her suit dismissed. Costs of appeal to be borne by the appellee. Cost of the District Court to be paid by the defendants.

Rehearing refused.

MONROE, J., dissents.

PROVOSTY, J., dissents.

No. 13,917.

CHARLES LANGE VS. ILLINOIS CENTRAL RAILROAD COMPANY.

SYLLABUS.

1. It is a general rule that a person who by his fault causes damages to another, whether by his act, or by his negligence, his imprudence or want of skill, is obliged to repair it.
2. Citizens are protected by the Constitution from warrants of arrest for crime issued against them, without probable cause, and they are entitled to recover damages from parties causing such warrants to issue. It is not necessary for such recovery that the arrest should have been actuated by malice, in the sense of personal ill-will towards, or desire to injure the party charged. The absence of such malice only affects the character and *quantum* of damages.
3. Advice of counsel in certain cases under certain circumstances gives a qualified protection to their clients in cases of *torts*, but not to the extent of enabling them to escape liability, though client and counsel are negligent or indifferent to consequences.

A PPEAL from the Civil District Court, Parish of Orleans—
King, J.

Cage, Baldwin & Crabites, for Plaintiff, Appellee.

Hunter C. Leake and Gustave Lemle (J. M. Dickinson, of counsel),
for Defendant, Appellant.

STATEMENT OF THE CASE.

NICHOLLS, C. J. Plaintiff's prayer in this action was that he have judgment against the defendant for ten thousand and fifty dollars, with legal interest.

The issues were tried by a jury. It returned a verdict in favor of plaintiff for fifteen hundred and fifty dollars. A judgment was rendered by the court in conformity with it, after a new trial applied for by the defendant was refused. The latter appealed. The grounds upon which the plaintiff's demand was founded were set forth in his petition, as follows:

That one J. W. Cassidy, an officer, servant, agent and employee of the company, at the instance, request, direction and instigation of the defendant did, on the 20th day of August, 1897, appear before the recorder of the First Recorder's Court of the City of New Orleans, a court having full jurisdiction, as authorized by law, to receive complaints, and upon verification thereof under oath to order arrests, commitments, bail, etc., and then and there acting in his said capacity, as servant and employee of said corporation, and in the exercise of the functions in which he was employed, and under instructions therefrom, made complaint against petitioner in the form of a sworn affidavit, charging petitioner as follows:

"That on the 20th day of August, 1897, between 11 and 12 o'clock P. M., at 1217 South Peter street, between Thalia and Erato, in this district and city, one Charles Lange did then and there wilfully and feloniously have in his possession two brass journals, valued at about four dollars (\$4.00) in United States currency, and the property of the Illinois Central Railroad, well knowing same to be stolen, in violation of Section eight hundred and thirty-two (832) of the Revised Statutes of Louisiana," and praying that petitioner be arrested and dealt with according to law.

That upon said affidavit the said recorder issued his warrant for the

arrest of petitioner, and upon said warrant petitioner was arrested on August 21st, 1897, by an officer of said First Recorder's Court, and taken before said recorder, and was then arraigned and held under bail for his further appearance for trial before said recorder on the 8th day of September, 1897.

That on said 8th day of September, 1897, petitioner appeared before said recorder then regularly holding his court, according to law, and the said Illinois Central Railroad Company appeared thereat through counsel and employees, and said counsel applied to the court for a continuance which was granted, and the matter fixed for the 24th day of September, 1897.

That on the said 24th day of September, 1897, petitioner appeared before the said recorder, then regularly holding his court, according to law, and that said defendant attended said trial with counsel, having summoned numerous witnesses, and directed and conducted the prosecution of petitioner upon said affidavit, and after full, fair and perfect trial, petitioner was found not guilty of the offense charged, and was discharged by said recorder, and the said criminal proceeding was then and there finally terminated by the acquittal and discharge of petitioner, and has in no manner been renewed.

That the said charge so made by said Illinois Central Railroad Company, through its said employee, was wholly false and unfounded to the knowledge of defendant, its agents, attorneys and employees, and that the said defendant, its servants, agents and employees, made said charge and caused the arrest, imprisonment and prosecution of petitioner maliciously and without probable cause.

That the said defendant, its agents, servants and employees, in making said charge, acted maliciously, recklessly, carelessly, without probable cause, and in utter disregard of petitioner's rights, and with total indifference to all consequences; that the slightest and most casual and most evidently suggested inquiry and investigation would have shown them that whatever suspicions they might have entertained, if any, that petitioner was guilty of the offense charged, were totally unfounded.

That the said defendant corporation and its said agents and employees moved thereto by bad motives, malice, and recklessness and disregard of social duties and of the rights of petitioner, as a man, a citizen and a member of society, made no investigation whatsoever of

the facts of this case, but made the affidavit herein utterly regardless of petitioner's rights and for their own sinister ends.

That after the making of said affidavit and the institution of said malicious prosecution, the said defendant, through its attorneys, servants, agents and employees, was made fully aware of all the facts tending to show petitioner's absolute innocence of the charge preferred against him, and whatever vague, reckless and unfounded suspicions they may have had at the time of making said affidavit, if any, were, or ought to have been, thereby dispelled, but, nevertheless, the said defendant corporation, its attorneys, servants and employees, persisted in their unfounded, illegal and malicious prosecution of petitioner.

That up to the time that this prosecution was instituted against him, he had never been charged with a criminal offense, and he had always borne a good reputation among those who knew him in this community in which he had always lived.

That by reason of said malicious and unfounded criminal prosecution by the said defendant, its attorneys, servants and employees, he incurred damages to the amount of fifty dollars (\$50.00) expended in attorney's fees in defending said prosecution.

That by reason of said malicious and unfounded criminal prosecution, which was widely published to the world, he has suffered loss of reputation, insult, shame, humiliation and anxiety of mind, and has been damaged thereby in the sum of five thousand dollars.

That by reason of the malice, bad motives, wantonness, negligence, recklessness, oppression and careless disregard for another's rights, shown by the defendant, its attorneys, servants, agents and employees, in this malicious and unfounded prosecution, petitioner has been damaged in the further sum of five thousand dollars and is entitled to a further decree in the said sum of five thousand dollars as exemplary and punitive damages.

Defendant answered. It first pleaded the general issue. Further answering it averred that the affidavit made by Cassidy against the said plaintiff in the First Recorder's Court, was made under the advice and pursuant to the instructions of this defendant's former attorney and counsel, learned in the law after a full investigation of the facts and a full and fair statement of such facts to said attorney and upon the legal advice of said attorney.

That in directing said affidavit to be made, this defendant and its said servants, and its said attorney, acted in good faith without malice and upon probable cause.

That among other facts reported to this defendant's said attorney, before the making of said affidavit, was the fact that a fresh journal brass, bearing in prominent letters the name of this defendant cast into said brass in the manufacture, and being covered with fresh oil or lubricant, indicating its recent use in some railroad car belonging to defendant, was found in the possession of said plaintiff at his place of business among sundry other railroad brasses, bearing the stamp of other railroad companies, some of them being connecting lines of this defendant, which fact was established upon the trial of said Lange.

That it was also stated as a fact to this defendant's said attorney before the making of said affidavit that none of the trunk lines of railway terminating in the city of New Orleans sold railroad journal brasses to junk dealers or others in the city of New Orleans, which said general custom the said plaintiff admitted to be the fact, and the same was otherwise proved before said recorder upon the trial of said plaintiff.

That it was further stated as a fact to this defendant's attorney, before the making of said affidavit against said plaintiff, that shortly prior to the making of said affidavit a number of journal brasses had been stolen from this defendant's cars and from cars belonging to other railroad companies connecting with defendant, and in defendant's possession as carrier, in the city of New Orleans, between the time said cars arrived at its government yard, and were inspected, and the time said cars reached its levee yards, where they were again inspected, all of which was shown and proven upon said trial to be true.

That it was further stated as a fact to said attorney, before the making of said charge, that upon one occasion the said plaintiff had bought a certain baby carriage from a small negro boy for twenty-five cents, after said carriage had been stolen from its rightful owner. Which said fact was also shown to be true upon the trial of said plaintiff upon said charge.

In view of the premises defendant prays that having fully justified in this behalf, this defendant be hence dismissed with costs.

The plaintiff is in the junk business in the city of New Orleans and has been for over twenty years. His reputation is good. In the latter

part of 1896, E. J. Brown, representing that he was an agent of the Armour Packing Company, a company running its own cars on different railroads, called at plaintiff's store and offered to sell him a number of car brasses which were then at one of the buildings of the North-eastern Railroad Company. Plaintiff told him he would call there the next morning, and he did so. Meeting with the master mechanic of that road he was told by him in answer to inquiries that Brown had the right to sell the brasses; that they belonged to the Armour Packing Company. He told the master mechanic that he would buy them and that he would send his wagon for them, and this he did. The brasses were taken to the store and there weighed, and plaintiff gave his check for the same to Brown. When received they were placed in a pile upon the floor of the room in which plaintiff held his office, and there remained up to the time of the occurrence which gave rise to this litigation. They were fully exposed to the view of any one entering the office.

In the summer of 1897 there were numerous thefts of car brasses, or journals, in New Orleans. To such an extent was this carried at that time that the newspapers of the city commented upon it a number of times. On the 20th of August, J. W. Cassidy, a detective or special officer of the defendant company, made an affidavit before one of the recorders of New Orleans, charging the plaintiff with wilfully and feloniously having in his possession two brass journals, valued at \$4.00, the property of the Illinois Central Railroad Company.

Before making this affidavit, Cassidy had gone to the plaintiff's store in company with one Donnelly, also a special officer or watchman of the defendant, and there met plaintiff's son, a young man of about eighteen, and an old man, one of plaintiff's employees. Plaintiff was absent at the time Donnelly and Cassidy went to Lange's store, at the suggestion of Sergeant Creigh of the police force. Cassidy was under Donnelly's orders. When examined, later as a witness before the recorder, Cassidy testified that he and Donnelly went together to Lange's store, that they had taken a piece of paper and wiped off the names upon the different brasses and found these two brasses among others. That the brasses were in the office on the floor; they had no trouble in finding or seeing them; they were not covered up; they were full of dust and full of grease. Mr. Lange himself was not in

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the store at the time. They met Lange's son and an old man there. Donnelly asked the latter to see the brasses and he showed them where they were. He asked him where Lange got the brasses and he said he had a receipt for the brasses from the Northeastern road; he asked to see the receipt, but they did not see it. They did not go back to see Mr. Lange at all, nor did they attempt to find out how long those brasses had been in the shop.

Donnelly left to get an inspector from the defendant company to go to Lange's. An inspector named Stretzinger came in later while Cassidy was there, but Donnelly was away at the time. The brasses were put in the inspector's care and taken off. He (Cassidy) made the affidavit. Donnelly asked him to make it, nobody else asked him; there was no conversation between himself and Stetzinger about the affidavit. He made the affidavit on the 20th of August, the same day he was at the shop.

When Donnelly was examined at a witness, before the recorder, he testified that he had not seen Lange on the occasion of his visit to the shop. He saw his son there and an old man. He did not see Lange at all, could not see him, asked his son and the old man for him several times, they did not tell him where he was; he did not ask them to tell Lange that he had been there to see him and ask him to call on him; he did not ask for any explanation as to why those brasses were there; neither he nor any one with him asked any one how those brasses got into there; he was positive of that; they asked if they had any brasses and they said "Yes;" that was all they asked. The brasses were in the shop; they were not concealed; they were in a pile on top of one another. If a person went into the office and looked around he could see them, but not from outside. The affidavit was made by Cassidy by his instructions. Being asked the question whether the particular brasses belonged to the Illinois Central Railroad, he answered that they were at one time its property; that they had the stencil mark of the Illinois Central, and should be the property of the company. The following questions were asked and answered:

Q. Then, any brasses that you see in the shop of a man with the I. C. mark upon them, you think that is sufficient evidence for you to arrest that man and charge him with a felony, do you?

A. Yes.

Q. Are those your instructions?

A. Those are instructions from our attorney.

Q. Those are your instructions?

A. From our attorney.

Q. When you made this affidavit, were you acting under instructions?

A. Yes, sir.

Q. From the railroad?

A. Yes, sir.

The car inspector, who has been referred to, went to Lange's store for the purpose of examining the brasses or journals. They were two of fifty brasses which were, as stated, in a pile on the floor of the office. He made no inquiries as to how Lange had come into possession of them, nor for what length of time he had held them. The record does not show any conferences between him and either Donnelly or Cassidy, the counsel of the defendant or the defendant company. Lange's son made out and gave to him a list of all the brasses his father had and delivered to him these two particular journals.

Counsel of the defendant testified that he conducted the proceedings before the recorder; that he was consulted by Donnelly and by his assistant Cassidy. There was no substantial difference between the statements made by them to him and those which they made before the recorder. He advised the making of an affidavit against the defendant charging him with having stolen property in his possession belonging to the defendant. He understood the affidavit was made on his advice. It was a rule of the company for its special officers, except where parties were detected in the very commission of a crime, to report the state of facts to the company's attorney, and to make a charge only after his advice was given. The first notice he had of this special case was from Donnelly, not Cassidy. He could not remember distinctly whether the statement to him was made the day the brasses were taken from Lange's or not; he must have investigated the matter for several hours; he had as full a statement as he could get from Donnelly and Cassidy; he was told *this*: That there had been discovered in Mr. Lange's junk shop, near the Illinois Central terminal, at the foot of St. Joseph street, in that district, within a very few hundred feet of the company's tracks and terminus, several brasses of the company which were bright and new with the oil fresh upon them; that it was

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not the custom of the company to sell its brasses or allow them to be sold in the City of New Orleans, or anywhere on the southern lines; that this was also the custom of all other railroads that had a terminal in New Orleans; that he could not remember whether he was told in what part of the shop the brasses were found, nor whether they were piled up nor how many brasses there were in the pile. He did not remember the details with certainty, but he did distinctly remember that at the time the statement was made, the further statement was made that a negro (Jerry White), who was in Mr. Lange's employ, had been convicted of stealing brasses from the New Orleans and Northeastern Railroad Company. That White had worked the most of his life in Mr. Lange's shop and drove his wagon. He was told that fact. He acted first upon the circumstance of finding new brasses with the company's stencil on them at Mr. Lange's place. He was told they were new; he had to take the statements made by his clients as every lawyer did; he did not see the brasses at that time. Donnelly and Cassidy were not his clients, but the servants of his client; they were his subordinates in the sense of their being the servants of his client; they were under him because they were bound to act under his instructions and to be guided by his advice; they belonged to an entirely different department of the company; he could not remember as an exact fact that these men had informed him that the brasses were piled up in the front office of Lange's store; he was satisfied that he did not know that the brasses were publicly exposed in Lange's shop so that anybody going along the street could see them; he did ascertain the place in the store where the brasses were, but his present recollection was that the pile of brasses was covered up by something. He was also told that the junk dealers (Lange included) were all aware of the fact that the trunk lines of railroads in New Orleans did not allow their brasses to be sold here. He was told that brass stealing from the railroads had been going on extensively all over the city, and had been commented on in the newspapers; he did not send to enquire of Lange how he had those brasses in his possession. He supposed one reason for having the affidavit made at once, was that the brasses would be got out of the way and the evidence lost. If the brasses had been taken from Lange's before the affidavit was made the fact must have been told him by Donnelly. The arrest was made partly from fear of the disappearance of the evidence, and partly

from his positive, honest, and sincere belief in Lange's guilt; he fully believed from the statements made to him that not only the brasses of the Illinois Central Railroad Company were stolen property in Lange's possession, but that the other brasses to which that company laid no claim was also stolen property, and he desired that the evidence should be found in his possession and recovered as soon as possible. He believed there was no reason for making further investigation; he had fully made up his mind. He was not informed that the Northeastern Railroad Company had investigated the matter, so far as it was concerned, and refused to take any action. After the affidavit was made, he had a conversation with Captain Day of the police force. He tried to impress upon him he had no case against Lange. Day told him that Lange had informed upon Jerry White and he did not think it was good policy to prosecute a man who had informed the police of a theft, and he asked him not to prosecute Lange, but he told him it was his duty to do so. He persisted in the prosecution in spite of Captain Day's request, because he believed then, and still believed, that Lange was guilty and acquired the brasses with knowledge that they were stolen property. He was satisfied at the time the case was before the recorder of the complicity of one of the witnesses (an employee of the Northeastern Railroad Company) with Lange. He knew nothing about Brown or any claim by Lange that he had ever bought any brasses from the Armour Packing Company, or from Brown at the time the prosecution was set on foot. He learned this for the first time on the trial or during one of the continuances, when an affidavit was produced from a man named Brown in Chicago. He objected to the introduction of this affidavit. He was aware of the custom among railroads hauling the cars of another company for the train crew, when the brass journals became heated or spoiled and worn out, to remove the brass with the stamp of the company thereon and replace it with one of their own, and to charge the other company with the price of that brass and that company pays for it, the new brass becoming the property of the company in whose car it is placed, and the worn out brass taken from the car becomes the property of the company which takes it out. He knew of the observance of that custom among the railroad companies in New Orleans at the time the affidavit was made, and he had that custom in mind when he advised it. He knew that any given brass of the Illinois Central Railroad

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Company, which was taken out of a car wheel when the car was in the custody and control of another company, on account of its defective condition, might be replaced by some other brass. He knew, though not as an actual fact, that brasses containing the stamp of the Illinois Central Railroad Company might be held by other companies.

The charge made against Lange in the affidavit referred to was, after several continuances, tried and examined into by the recorder, and he, after a full hearing of evidence, discharged the accused. The charge was not renewed and this suit followed.

OPINION.

The defense made in this case is that the defendant company acted in the matter of making the charge against the plaintiff contained in Cassidy's affidavit, without malice, upon probable cause and upon advice of counsel. The facts and the circumstances connected with the affidavit and charge were not only placed before the recorder when the charge was investigated, but the entire testimony taken before him, together with additional evidence, was also submitted to the jury which tried the present action. The jury returned a verdict in favor of plaintiff, under a charge of the court, which was very favorable to the defendant.

We are satisfied, as a fact under the evidence, that the plaintiff, Lange, was not guilty of the charge laid against him in the affidavit and that he purchased the brass in good faith from Brown. There was no evidence to show that the brasses had been in fact stolen, and none indicating that Lange would have had reason to know that they were stolen, had such been the fact. The brasses were not entirely new. They had been used, and their condition was such as might well have authorized their removal from a car to which they were attached on some particular occasion by a train crew of the railroad company which had control of that car at that particular time on its own road. If this was the fact the brasses removed would, under the custom of interchange shown to have existed between railroad companies, become the property of the company which removed the same and subject to sale by that company as old brass or scrap.

It would not follow at all because brasses of the Illinois Central Railroad Company, with its mark upon them, should be found in a junk shop in New Orleans, and because under a rule of that company

it did not sell its own old brasses in New Orleans, but sent them to be melted at McComb City, that, therefore, they were stolen property. It was shown that the plaintiff was in no manner responsible for the actions of the negro Jerry White, in whose possession it would seem stolen brasses had been found on some occasion, and who confessed, or who was convicted, of having stolen them or received them knowing them to be stolen. This negro at one time, but long before this, had been in Lange's employ, but he was no longer with him, and so far from being identified or connected with White's guilt it was through information received from the plaintiff that White was arrested and convicted. Counsel of the company was informed of this fact before the charge was investigated before the recorder and was told by Captain Day of the police force that there was no case against the plaintiff, but the charge was, nevertheless, forced to trial. We are satisfied that the special officers of the defendant company who had charge of this matter were so anxious to protect its property from theft that they lost sight of the rights of others, which it was equally their duty to recognize and not infringe upon. We are satisfied that not only were they guilty of gross negligence in acting as they did, without availing themselves of means of information directly within their reach, but that the information which they did have was not communicated to counsel.

The brasses were not concealed. They were uncovered in a pile upon the floor of plaintiff's shop into which the public had free access. Lange was absent when they went to his store, but they were informed by his son that he had bought them and had a receipt for same. The son made no objection to delivering and did deliver at once, and before the affidavit was made, these particular brasses to the employee of defendant company who had been sent to examine them, and besides this he made out and gave to him a list of all the brasses in the store. Everything indicated a willingness to submit to full investigation. Instead of giving the plaintiff the opportunity to explain the situation, to which he was entitled under the circumstances of the case, these officers immediately filed an affidavit against him charging him with crime.

Our Civil Code, in Articles 2315 and 2316, declare that every act of man that causes damage to another obliges him, by whose fault it happened, to repair it; that every person is responsible for the damage

he occasions, not merely by his act, but by his negligence, his imprudence or his want of skill.

Under the express terms of the law, any damage which is occasioned by one person to another renders the latter responsible for the same, whether it result from an act, from negligence, from imprudence, or want of skill, whenever the occasioning act rises to the point of being a "fault," unless there be some provision in the law withdrawing some particular case or class of cases from the operation of this rule.

We have, therefore, to examine each case upon its own special state of facts.

As far back as the case of *Miller vs. Holstein* (16 La. 389), this court said in a libel case that our courts were not bound by the technical rules of the common law, though, whenever our own law is silent, they may resort to a foreign system for a rule if consistent with reason and equity; that it was not prepared to adopt the common law distinction between words actionable in themselves and words which are not, and to decide that one cannot recover unless charged with an indictable offense without proof of special damage; that such a doctrine was not supported by Article 2294 C. C. (now Article 2315), which embraces all injurious words.

This declaration has been repeated a number of times since.

In *Wells vs. Johnston, Sheriff*, 52 Ann. 723, we said: "While our Code, in dealing with offenses and *quasi*-offenses, has used very general language and has not attempted to fix or classify faults by Article 2315 of the Code, our courts have constantly recognized that what might be regarded as legally a fault under one set of circumstances, would not be so under another, and that acts done by a person holding certain relations or capacities might be perfectly justifiable, which, if done by another in a different capacity, or holding a different relation, would be attended by penalties, and they have denied, narrowed or broadened, relief as different cases were presented in which a fault was charged according to known and fixed rules."

That case was one in which damages were claimed of the Sheriff of Ouachita Parish by a citizen of that parish for having arrested and confined him in prison on a charge of having committed a crime in Alabama without holding in his hands at the time a warrant for his arrest.

It was claimed by the defense that the sheriff had acted without malice in the line of his official duty, and that, as a condition precedent to recovery, plaintiff should establish, he had acted both maliciously and without probable cause; that the case was controlled by the rules governing cases of malicious prosecution.

We held in that case that it was not necessary that the plaintiff should have shown "malice" on the part of the sheriff; that there was no reasonable ground for having summarily arrested and imprisoned the plaintiff upon the mere suspicion which the sheriff entertained as to the identity of the plaintiff. The court said: "We have no reason to suppose the sheriff acted in this matter maliciously, that is, with the intention of injuring the plaintiff. We do think, however, that he acted without legal authority and in utter disregard of plaintiff's personal rights, though, under a mistaken idea as to what those rights were, and as to how far his own authority extended. Plaintiff cannot be made to suffer by defendant's misconceptions on that subject.

In dealing with the subject of charges of crime made by one private individual against another in a proceeding inaugurated before a recorder, we recognize fully, as was said in *DeArmant vs. St. Amant* (40 Ann. 375), that "it is not only the lawful right, but the civil duty of every citizen to set on foot criminal proceedings whenever he believes honestly, and on reasonable grounds, that a crime has been committed. The social interests require and the law invites him thus to aid the State in the discovery and punishment of crime, and it would be equally unjust and impolitic to make him a guarantor of the success of the prosecution as to make its failure an actionable wrong," but on the other hand, Article 7 of the Constitution declares to us that the right of the people to be secure in their persons, papers and effects, against unreasonable searches and seizures, shall not be violated, and *no warrant shall issue except upon probable cause* supported by oath or affirmation, and particularly describing persons or things to be seized," while Article 5 declares that "all courts shall be open and every person for injury done to him in his rights, lands, goods, person or reputation, shall have adequate remedy by due process of law and justice, and justice administered without denial, partiality or unreasonable delay."

It is our bounden duty, while seeking to uphold and vindicate the laws of the State, to see that we do not sacrifice to those interests of

the public the personal constitutional rights of the citizens. It will be seen that however flexible a definition may be given to the word *malice*, and how muchsoever the General Assembly may require the presence of *malice* in any particular act to be a necessary factor and condition precedent to a right of action, based upon that act as a fault, the absence of malice in a particular instance can never be invoked as a defense where the action is predicated upon injury done to person or reputation by a warrant issued upon the oath or affirmation of a party, but without the existence of probable cause. The existence of probable cause may protect a person even though he be acting from malice, but the converse of this proposition is not true. The absence of malice in a particular case where a warrant has been issued without *probable* cause may lessen the relief given to the plaintiff and exclude the infliction of "vindictive" or exemplary damages upon the person making the charge, but it will not justify courts in refusing to grant compensatory damages. To those damages plaintiff is entitled by force of the Constitution itself. Defendant urges in bar of this action that it acted in the premises upon advice of counsel.

Advice of counsel unquestionably gives in certain cases, and under certain circumstances, a qualified protection to the client, but we are not prepared to extend this doctrine to the point claimed by the defendant. Altering a little our language in *Anderson vs. Elder*, 105 La. 676, we say that to do this would have the effect, if strictly followed, of limiting the responsibility of the client to an extent which would enable him to escape liability though he and his counsel were negligent or grossly indifferent. (*Nelson vs. Railroad Co.*, 49 Ann. 492; *Wimbush vs. Hamilton*, 45 Ann. 1190.)

We cannot in this case, with any justice or propriety, relieve the plaintiff from all liability by reason of advice of counsel. We consider it solely in mitigation of damages.

The courts of our State are not places from which, as from places of secure refuge, parties can with impunity perpetrate wrong. (*Wimbush vs. Hamilton*, 45 Ann. 1190.) We are of the opinion that the charge made against the plaintiff was without probable cause; that defendant's special officers were guilty of gross and inexcusable negligence in not ascertaining the facts of the case before making their report to defendant's counsel, and in not stating to him at the time

they made their report the facts which they knew, which would or should have influenced his course in the premises. That they acted with inexcusable indifference to plaintiff's rights, and that the defendant is responsible in compensatory damages for their action. The plaintiff was never placed actually in arrest, but he was constructively in arrest. Being informed that an affidavit had been made against him, he went of his own accord to the recorder's office, and was at once released on bond. He remained under bond until discharged. He was necessarily subjected to humiliation and mortification by reason of being placed unjustifiably before the public as a receiver of stolen goods.

We think the judgment appealed from is far too large an amount. For the reasons herein assigned the amount of the judgment is hereby reduced to one thousand dollars, and as so amended it is hereby affirmed. Costs of appeal to be borne by appellee.

Rehearing refused.

107 702
e114 624

No. 13,918.

107 702
121 155

W. T. ADAMS MACHINE COMPANY VS. ISIDORE NEWMAN.

SYLLABUS.

1. Where all the essential elements and conditions for an absolute sale are present, in a contract between parties, the effects flowing legally from that particular contract follow, whether the parties foresaw and intended them or not, and though they may refer to the contract as an agreement to sell or as a conditional sale.
2. Where machinery has been sold to a planter which he has immobilized by attaching it to his plantation and the property to which the same was attached was permitted to be seized and sold without opposition of any kind in enforcement of a pre-existing mortgage, the seller cannot, after the sale as against the purchaser, recover the machinery under a claim of ownership.

A PPEAL from the Civil District Court, Parish of Orleans—*King, J.*

Merrick & Lewis, for Plaintiff, Appellant.

Clegg & Quintero, for Defendant, Appellee.

STATEMENT OF THE CASE.

NICHOLLS, C. J. The plaintiffs, in their petition filed April 8th, 1895, alleged themselves to be the owners of certain boilers, cotton gins and other machinery which were then on a plantation in the Parish of East Baton Rouge, belonging to the defendant. That on July 10th, 1891, they entered into a contract with W. S. Slaughter & Bro., by which they placed the said machinery in the possession of said Slaughter with a suspensive condition of sale, that the entire price should be paid for the said machinery.

That it was understood the title to the said machinery was to remain with petitioners until the said price was paid, as would more fully appear by the said contract, which they declared they annexed. That the defendant, being well aware that said property belonged to petitioner, received possession of the same nevertheless; took possession of the same and maliciously and illegally refused to deliver the same to petitioners, although the same had been repeatedly demanded of them, claiming that the same belonged to him.

That defendant had illegally and wrongfully held possession of said property for over a year. That the action of defendant in withholding the property was malicious and for the purpose of causing petitioner an injury, and they were entitled to recover damages for the said malicious and illegal action.

That they had been injured in the sum of eight hundred and fifty dollars by said malicious and illegal action, and they placed their damage, attorney's fees, the use of the machinery for one year, the annoyance and vexation incident to and growing out of the wrongful action of the defendant at five hundred dollars, and punitive damages at three hundred dollars. They prayed that defendant be ordered, adjudged and decreed to deliver over the said machinery to them or upon failure so to do, to pay to them the price thereof, to-wit, the sum of fifteen hundred and fifty-two and 95-100 dollars, with interest from March 15th, 1893, and for eight hundred and fifty dollars damages, with legal interest thereon. Plaintiffs annexed the following instrument to their petition:

"STATE OF LOUISIANA,
County of East Baton Rouge.

"W. S. Slaughter & Bro.—Trust Deed to W. T. Adams Machine Co.,
W. M. Ross, Beneficiary Trustee.

"This indenture, made and entered into this 10th day of July, A. D. 1891, by and between W. S. Slaughter and Joseph H. Slaughter, composing the firm of W. S. Slaughter & Bro., the parties of the first part, W. M. Ross as trustee, party of the second part, W. T. Adams Machine Company, manufacturer, of the city of Corinth, county of Alcorn, in the State of Mississippi, of the third part—Witnesseth:"

"That the first party, for the consideration hereinafter stated, and the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey to the said second party, his successor or successors and their assigns, all the right, title, claim or interest, of said party of the first part in and to the following property" (describing it). "All the above described machinery is located in the Parish of East Baton Rouge and State of Louisiana, and is all the machinery of this description that is owned by or in the possession of the party of the first part."

"To have and to hold said property, together with all the appurtenances thereunto belonging and all the improvements that may be afterwards attached or added thereunto. But this conveyance is made in trust, however, for the following purposes, to-wit: the said first party is justly indebted to the said third party in the sum of fifteen hundred and fifty -two and 95-100 dollars, evidenced by our several promissory notes or contracts, as follows, to-wit: one for the sum of \$317.65, dated the 10th of July, A. D. 1891, and due and payable on the 15th day of September, 1891; one for the sum of \$617.65, dated the 10th day of July, A. D. 1891, and due and payable on the 1st day of January, 1892; one for the sum of \$617.65, dated the 10th day of July, 1891, and due and payable on the 1st day of September, A. D. 1892,—which said notes were paraphed '*Ne Varietur*,' by R. J. Hummel, notary public, for identification herewith, with interest on each from date at the rate of eight per cent. per annum until paid, and in each of which said notes it is specified among other things that the legal title to the said machinery for the purchase money of which said notes were given, and which is

not waived hereby, was and is reserved in the said third party until full payment of all the said notes therefor, together with all the interest accrued thereon, and to more effectually secure and make certain the payments of the said promissory notes or contracts as hereinabove described, this conveyance is executed. Now, if the said first parties shall pay off and discharge said notes as they respectively fall due, together with all the interest accrued thereon, and the costs of executing and recording this conveyance, then the same shall be void and of no effect. But if default shall be made in the payment of said promissory notes or contracts, or either of them, or any part thereof or either of them, as they shall respectively and successively fall due as hereinabove provided, then and in that event each and all of said notes, whether due or not, according to tenor and effect thereof, shall be taken and considered as due, payable and collectible from the date of such default."

"And the said second party, his successor or successors, shall at the request of the said third party, his assigns or personal representatives, with or without first taking possession of the said property, and with or without having it present at day of sale and after giving five days' notice of the time, place and terms of sale, by posting notices thereof in at least three public places in the county and State wherein said property is situated, proceed to sell the same to the highest and best bidder and purchasers for cash at the place named in such notice, and apply the proceeds arising therefrom, first, to the payment of preparing and recording this instrument; second, to the payment of two and one-half per cent. commissions thereon to said trustee or his successor and the necessary expenses incurred by him in executing said trust, which shall also include reasonable attorneys' fees by him incurred; third, to the payment of the said promissory notes or indebtedness herein secured, and the overplus, if any, then to be paid to the said first parties or whoever may be entitled to the same. And in the event of a sale of said property by said trustee, he shall make as good and valid a title to the same as the first and third parties could now make. It is further understood and agreed between the parties hereto that the said first parties are to retain possession of said property until default in the payment of one or either of said notes, and that the said third party or assigns or personal representatives are hereby granted the right, power and privilege at any time, at their option, to appoint another trustee in the place of the said W. M. Ross to carry

out and execute the trust, and to change the said trustee as often as the said third party may so desire, which appointment may be in writing and exhibited at this said sale in the event of a sale thereof. And the said first parties hereby waive and relinquish all right of redemption and consent that the purchaser, in the event of sale of said property, or any part thereof, take a perfect and indefeasible title in and to the same."

"In testimony whereof, the first parties hereunto set their hand and seal the day and year above written."

"(Signed) (Seal) W. R. AYRES.

"(Signed) (Seal) W. S. SLAUGHTER & BRO.

"(Signed) (Seal) J. R. MATHEWS.

This was recorded in East Baton Rouge Parish, in the book of mortgages, on September 12th, 1891. The notes referred to in this instrument, identical except as to date of payment, were as follows: Promissory notes annexed to commission offered in evidence by plaintiff, marked Exhibits "B" and "C." Filed June 19, 1899.

"B"—\$617.65.

CORINTH, MISS., July 10th, 1891.

"On the 1st day of September, 1892, we, or either of us, promise to pay to W. T. Adams Machine Co., at their office in the City of Corinth, Alcorn county, Miss., purchase money for" (describing certain machinery). "Contracted to be sold to and now in possession of the undersigned the sum of six hundred and seventeen 65-100 dollars, with interest thereon, from date until paid at the rate of 8 per cent. per annum."

"It is understood and agreed that the title in and to said property shall remain in said W. T. Adams Machine Company until this note, with all the others, for the purchase money of said property is paid, and the said W. T. Adams Machine Company, their agents, representatives, or assigns, if said sum is not paid at maturity, may either enforce a collection thereof by suit, or take possession of said property wherever found, as theirs, and in the latter event any and all sums previously paid on this or any note given for the purchase money of said property, shall be taken as rental and payment for the use, wear and tear thereof."

"And it is further agreed that if suit be brought to collect said

Machine Co. vs. Newman.

sum, an additional sum of 10 per cent. thereon shall be recovered as an attorney's fee thereof."

"(Signed) (Seal) W. R. AYRES.

(Signed) "(Seal) W. S. SLAUGHTER & BRO.

"(Signed) (Seal) J. R. MATHEWS.

An exception of no cause of action, filed by the defendant, was referred to the merits.

Defendant answered first pleading the general issue.

Further answering, he averred that the property described in plaintiffs' petition was an immovable by destination and was attached to the plantation in the Parish of East Baton Rouge. That he acquired the said property by purchase at a public sale made by the sheriff of East Baton Rouge, under process of court, on the.....day of.....189.....

That he acquired the same free from mortgage or privilege in favor of any one and more especially the plaintiff; that he was the true and lawful owner of the same. He prayed that plaintiff's demand be rejected.

Plaintiffs filed a supplemental and amended petition, in which they reaffirmed all the allegations of the original petition. They averred that the notes referred to in the contract, annexed to and made part of the original petition, are two certain non-negotiable promissory notes, dated Corinth, Miss., July 10th, 1891, for six hundred and seventeen and 65-100 dollars (\$617.65) each and payable, respectively, on the 1st of January, 1891, and 1st of September, 1892, and bearing interest at eight per cent. (8 per cent.) per annum from date.

"Your petitioner further shows that, in said notes, it was understood and agreed that the title to the machinery referred to in plaintiff's original petition shall remain in the W. T. Adams Machine Co., until said notes, with all others for the purchase money of said property, are paid and the said W. T. Adams Machine Company, their agents, legal representatives, or assigns, if said sum is not paid at maturity, may either enforce the collection thereof by suit, or take possession of said property wherever found, as theirs, and in the latter event any and all sums previously paid on this or any other note given for the purchase money of said property shall be taken as rental and payment for the use and wear and tear thereof."

"And it is further agreed that if the suit be brought to collect said

sum, an additional sum of ten per cent. (10 per cent.) thereon shall be recovered as attorney's fee therefor, all of which will more fully and at large appear, by reference to the said notes annexed and made part of this petition for greater certainty."

"Your petitioner further shows that said contract was recorded in the Parish of East Baton Rouge, and that Isadore Newman, the defendant in this case, had notice of all the conditions annexed to this contract, and, nevertheless, maliciously and illegally took possession of petitioner's property and openly refused to deliver same to your petitioner."

They prayed for citation and for judgment as prayed for in their original petition.

Defendant excepted to this petition for the reason:

"1st. That the amended and supplemental petition changes the issues presented in the original petition and delays the trial of this cause."

"2nd. That the original petition herein filed was a suit upon a contract, or a suit sounding in damages, and that the exception of no cause of action has been cumulated with the merits, and that it is now too late for the plaintiff to change or attempt to change the issue and to bring suit upon said note or notes."

"3rd. That the facts sought to be alleged in the amended and supplemental petition were known to the plaintiff and to his counsel, and, if true, could have been, and should have been, set up in the original petition."

In view of the premises, they prayed judgment on these exceptions, and that the amended and supplemental petition be rejected at plaintiff's costs, and, as in his original answer, prayed that the plaintiff's suit be dismissed at his costs.

These exceptions were referred to the merits.

The District Court rendered judgment in favor of the defendant, and plaintiff appealed.

The evidence shows that the machinery involved in this litigation was placed in the possession of Slaughter & Bro., under their contract with plaintiffs, and was by them set up on their plantation in East Baton Rouge.

That they paid the plaintiffs, upon the price of this machinery, three hundred dollars on or about the 20th of July, 1891, and three

hundred and twenty-two dollars on or about the 26th of September, 1891; that no other payments were made.

The defendant, holding a mortgage on this plantation on which the machinery was, enforced the same by seizure and sale and at the same made in execution became the adjudicatee. Upon the certificate of mortgages read at the sheriff's sale by the sheriff, under the number 12, was recited: "A trust deed in favor of W. T. Adams Machine Company for \$1,552.95, evidenced by three promissory notes, all bearing interest at the rate of eight per cent. per annum from July 10th, 1891, until paid, recorded September 12, 1891.

In the brief filed on behalf of the plaintiff it is said: "The sale was a conditional sale and it was therein stipulated that the title to the machinery should remain in the vendor until the entire price was paid. A large part of the price was never paid and the title never passed to Slaughter Bros."

Plaintiffs urge that the condition here spoken of was the *suspensive condition*. That upon default of Slaughter & Bro., on the payments of the notes, they were entitled to retake possession of the machinery as being their property and that defendants' interference with the exercise by them of this right was unwarranted and unjustified! They refer the court to various articles of the Civil Code touching conditional obligations (C. C. 2471, 2457, 2043, 2044) and touching conditional sales to the decision of this court in *Baldwin vs. Sheriff et al.*, reported in 47 Ann. 1468, 1469.

They maintain that there is no immobilization of a movable which, belonging to one person, is attached to real estate by reason of the owner of the real estate attaching it to the immovable. That under a seizure and sale of the real estate with movable property attached to it, under such circumstances, the title to the movable does not pass to the purchaser as it would be the property of a third person and is therefore null. (C. C. 2452.) That the owner of the movable has the right to claim it with remuneration for its use and damages if taken and retained improperly. They maintain that even if title to the property passed to Slaughter & Bros., their vendor's privilege was not lost by the fact that the latter should have thought proper to annex the machinery to an immovable and they would have the right to assert this privilege, such action to the contrary notwithstanding.

The defendants differentiate the Baldwin case from that now before

the court. They say that in that case, though there had been a sale of the movable, the price being unpaid, the vendor had had recourse to judicial proceedings and under an enforcement of the resolutive condition he had obtained a judgment contradictorily with his vendee dissolving the sale and that the appearer, therefore, was before the court as the owner of the movable by decree of court. That in this case the plaintiff had never sued Slaughter & Bro., nor are they parties to this suit, but that plaintiffs sue as absolute owners of the machinery, as if the contract with Slaughter had never been made and as if the judicial sale of the plantation of Slaughter & Bro., to which the machinery was annexed, and at which sale the defendant bought the plantation, had never taken place. "The plaintiffs had not availed themselves of their right to sue for the dissolution of the contract, nor did they attempt to have the property upon which they might have had a privilege sold separately, but, on the contrary, as against themselves, they had shown they had delivered the property with a dissolving condition to its debtor and to be sold confusedly with the mass of the debtor's property. Having done this, they cannot claim even a vendor's privilege and cannot set up a claim of ownership against a third person because it has not caused itself to be declared by a court entitled to the effect of the dissolving condition and has not placed itself in the position of such creditor as is required by the Code."

We have to dispose of the rights of parties as presented by the pleadings.

Plaintiffs *claim the ownership of the machinery* covered by the contract made by them with Slaughter & Bro. They say that contract evidenced a mere conditional sale—a sale suspended by a condition—the condition being that the entire price should be paid before the title to the property should pass. Is that position sustained by the evidence? We think not. Comparison of their contract with Slaughter Bros. with that referred to by this court in *State ex rel. Buckley vs. Whited & Wheless* (104 La. 125), and with that discussed in *Heryford vs. Davis* (102 U. S. 235), will show that the contract between themselves and Slaughter Bros. was evidently a present sale, intended to be and actually in such form and condition as would enable them to insist that it evidenced either an absolute sale or a conditional sale under a suspensive condition as the requirements of their interests under differing circumstances might exact, but it is impos-

sible for a contract at one and the same time to be a contract of entirely different and conflicting characteristics. Our Code says that all things that are not forbidden by law, may legally become the subject of or the motive for contracts, but different agreements are governed by different rules adapted to the nature of each contract to distinguish which it is necessary in every contract to consider:

1st. That which is the essence of the contract for the want whereof there is either no contract at all or a contract of another description. Thus a price is essential to the contract of sale; if there be none it is either no contract, or if the consideration be other property it is an exchange.

2nd. Things which though not essential to the contract, yet are implied from the nature of such agreement if no stipulation be made respecting them, but which the parties may expressly modify or renounce without destroying the contract or changing its description; of this nature is warranty which is implied in every sale, but which may be modified or renounced without changing the character of the contract or destroying its effect.

3rd. Accidental stipulations which belong neither to the essence nor the nature of the contract, but depend solely on the will of the parties. The term given for the payment of a loan, the place at which it is to be paid and the nature of the rent payable on a lease are examples of accidental stipulations.

What belongs to the essence and to the nature of each particular description of contract is determined by the law defining such contracts; accidental stipulations depend on the will of the parties, regulated by the general rules applying to all contracts."

Our Code recognizes conditional contracts; it recognizes a classification of conditions, as "conditions precedent" and "conditions subsequent," "suspensive conditions" and "dissolving or resolutive conditions," and it affixes to each class their appropriate legal effect. It recognizes (as we declared in the Buckley case) "promise of sale, conditional sales and sales with earnest," also absolute present sales with the dissolving condition implied.

There was nothing standing in the way of the plaintiffs making a conditional sale of the machinery referred to and fixing the conditions attached thereto, but it was beyond their power to make, in fact, a contract of absolute sale of the machinery and withdraw from such

sale the effects fixed and flowing from it by virtue of the law itself. We repeat here what we said in the Buckley case: "Parties are at liberty to make contracts as long as they are legal, and to agree upon accidental stipulations, but when they make a contract with fixed legal essentials they are powerless to control the legal effect of the contract itself; the contract being made, the law governs its results (Cooley vs. Broad, 29 Ann. 345). What we have just said about "rights" extends to "remedies." In Lericks vs. Walker, 15 Ann. 246, this court said: "Parties regulate their own conduct by their stipulations, but they cannot prescribe rules of proceeding for public officers nor demand that the courts of justice shall depart from the usual mode of enforcing their decrees."

The plaintiffs do not claim this machinery as theirs by virtue of the operation in their favor of the resolutive or dissolving condition on a contract in which the title of the property, the object of the sale, passed first to the purchaser and was subsequently withdrawn by reason of non-payment of the price. Had they presented such a claim they would have been met with the legal proposition that the dissolution of a contract for failure of parties to comply with engagements does not take place of right; the party complaining of the breach had to either sue for the dissolution or ask for the same by way of an exception taken in a suit brought against himself.

The condition which they invoke in their favor is not the "resolutive condition," or "dissolving condition," but the "suspensive condition," which, if it existed, kept this machinery constantly not only on paper, but, in fact, in the ownership of the plaintiffs. That claim is not supported by the evidence. The contract they made is not such as they claim it to have been. With matters standing as they are, the requirements of the case do not call for any expression of opinion as to what rights or remedies they might have had had they pursued a different course, nor as to whether they yet have any rights or remedies, and, if so, what they are or may be. The plaintiffs did not enjoin the sale of this machinery forming part of the plantation when it was sold in execution of defendant's mortgage, nor did they intervene or proceed by third opposition to safeguard their rights. They allowed the property to be sold as an entirety and defendant to purchase it as such. We do not think it necessary to enter into any extended discussion of the legal points raised in this case. They will

Board of Health vs. Oil Co.

be found covered by the opinions rendered in the case of *Baldwin vs. Sheriff*, 47 Ann. 1468; *Maginnis vs. Oil Mill*, 47 Ann. 1489; *Scannell vs. Beauvais*, 38 Ann. 217; *Walburn Swenson Co. vs. Darrell*, 49 Ann. 1044; *Hall et al. vs. Hanley & Co.*, 49 Ann. 1047, and the authorities cited in those cases. For the reasons assigned, it is ordered, adjudged and decreed, that the judgment appealed from be and it is hereby affirmed.

No. 13,909.

LOUISIANA STATE BOARD OF HEALTH VS. STANDARD OIL CO. (P. S. MORRIS, AGENT.)

SYLLABUS.

Act 192 of 1898, in establishing the State Board of Health, and requiring it to see to the inspection of coal oil, throughout the state, by reasonable implication confers upon said board authority to provide the means of defraying the expense of such inspection in the usual manner, to-wit: by the exaction of an inspection fee from the dealer in the oil, and such fee is not a tax, but a charge for services rendered.

A PPEAL from the Civil District Court, Parish of Orleans—
King, J.

Francis C. Zacharie, for plaintiff, appellee.

Saunders & Gurley, for defendant, appellant.

The opinion of the court was delivered by

MONROE, J. The sole question presented in this case is, whether the State Board of Health is entitled to collect fees for the inspection of petroleum, and its products, outside of the city of New Orleans? The defendant has appealed from an adverse judgment. By act 37 of 1877, such inspection was required to be made in every city and town of not less than two thousand inhabitants, except the city of New Orleans, by inspectors appointed by the municipal authorities, and in the City of New Orleans by inspectors appointed by the Board of Health. The municipal authorities in the various cities and towns

were authorized to fix the salaries of the inspectors appointed by them, and the Board of Health was authorized to fix the salaries of the inspectors appointed by it. So far as the municipalities were concerned, they, doubtless, found authority in their charters by virtue of which they were enabled to collect such fees as were necessary to defray the expense thus imposed upon them, but there was, and is, a special provision in the act of 1877 authorizing the Board of Health to charge a specific fee for inspection in the parish of Orleans. By the second section of act 192 of 1898, the obligation of providing for the inspection of petroleum throughout the State, as well as in the parish of Orleans, was imposed on the State Board of Health, created by that act, leaving to the local Boards, which are also provided for, the regulation of the *sale* of the article. No specific provision is however made by the act of 1898 concerning inspection fees, and it is claimed by the defendant, that, in the absence of any direct grant, the Board is without authority to exact such fees, notwithstanding that it renders, and is obliged to render, the service. This position, we think, is untenable. The rule of construction applicable to the charters of municipal corporations is equally applicable to the charter of the State Board of Health. As to municipal corporations, it is well understood that they may exercise not only powers expressly granted, but those, necessarily or fairly implied in, or incident to, the powers expressly granted, and, also those which are essential to the declared objects and purposes of the corporation. Dillon on Mun. Corps. (4th Ed.), Vol. 1, 89. The same rule of construction is applied in cases of private corporations. Taylor on Corps. (3rd Ed.), 120; Morawetz Pr. Corp. 149. The functions, for the discharge of which the State Board of Health is established, are of vital consequence to the whole people of the State, affecting them in the matter of health and safety, and there is no reason why a narrower rule of construction should be applied to the powers of that Board than to those of corporations of comparatively minor importance. When the general assembly vested in the Board the authority, and imposed upon it the obligation, to see to the inspection, throughout the State, of an article of commerce, which, uninspected, may be dangerous to human life, it is a reasonable inference that it intended that the means for the accomplishment of the work should be provided in the manner which, it may safely be said, is universally recognized and adopted, i. e., by the imposition of

Olberding, Wife, vs. Gohres, Husband.

a charge upon the dealer in the article inspected sufficient to defray the cost of inspection. In the case of the city of New Orleans vs. Hop Lee, 104 La. 601, it was held that a fee exacted from the proprietor for the inspection of a laundry was neither a tax nor a license, but was merely a charge to cover the cost of inspection, and, it might have been added, for services rendered. It is a well settled doctrine that the power vested in a municipal corporation to license a particular occupation carries with it the right to charge a reasonable fee for the issuance of the license. Dillon on Mun. Corps. (4th Ed.), Vol. 1, 357, 358; Welch vs. Hopkins, 39 Conn. 140; St. Paul vs. Dow, 37 Minn. 20. The same principle applies in the instant case, and the argument that the Board of Health may abuse its power by sending inspectors from New Orleans to inspect oil in distant parts of the State and by charging the traveling and hotel expenses as inspection fees, is, it seems to us, based upon a groundless apprehension. When a case of that kind is presented it will be considered upon its merits. There is no such state of facts suggested in the record before us.

Judgment affirmed.

No. 13,899.

MRS. MARY C. OLBERDING, WIFE OF JOSEPH GOHRES, vs. JOSEPH GOHRES, HER HUSBAND.

SYLLABUS.

A husband may be guilty of outrages towards his wife of character such as to render their living together insupportable without raising his hand against her—his conduct may be the very refinement of cruelty without either force or blows.

A PPEAL from the Civil District Court, Parish of Orleans—
Sommerville, J.

Zengel, Thomas & Suthon, for Plaintiff, Appellee.

Benjamin Rice Forman, Jr., and *E. A. O'Sullivan*, for Defendant, Appellant.

Olberding, Wife, vs. Gohres, Husband.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff, the wife of Joseph Gohres, obtained a judgment against the defendant, decreeing a separation from bed and board between herself and her husband, giving her the custody of the minor child, issue of their marriage, and ordering that her said husband pay his wife twenty-five dollars per month. The judgment further ordered that a sale of certain described property made between himself and his brother, Henry Gohres, on August 2, 1900, by act before W. B. Barnett, notary public, be cancelled and annulled as being simulated and fraudulent; that Joseph Gohres and Henry Gohres be enjoined from disposing of or mortgaging the said property, and from negotiating the mortgage note which had been executed by Henry Gohres simultaneously with the execution of the said act of sale.

Plaintiff's action was based upon allegations of such cruel and outrageous conduct towards her by defendant as made their living together insupportable. These general allegations are followed by the specific allegation that her husband had publicly defamed her.

In the original answer the husband pleaded the general issue, and averred that he had always conducted himself as a faithful and dutiful husband, and fulfilled all his moral and legal obligations. He prayed that her suit be dismissed.

In a supplemental answer, he averred that the statements charged to have been made by him, and to constitute defamation, if made, were made to the relatives of the plaintiff, for the purpose of inducing reformation in the conduct of the plaintiff, and could not be held to be a public defamation. He averred that he was justified in any statements or complaints to his wife's relatives he may have made by information conveyed to him from a credible source. Both defendants denied that the act of sale was fraudulent, or simulated, and maintained its validity.

The evidence discloses that the husband of the plaintiff, upon several occasions, accused her in the presence of another person of an infamous crime, and, also, upon several occasions, when she was not present, charged her with the same crime separately to the same persons. He contends that this was done with the view of bringing about a reformation in his wife. The crime charged, if once committed, could not be done away with by reformation. It did not

Succession of Moise.

depend for its enormity upon continuance—once done its effect would forcedly remain forever. Not only was the charge made as has been stated, but defendant insists upon the truthfulness of the accusation in his pleadings, and yet he is content to have the marital relations between himself and his wife continue. The only possible explanation of this conduct on his part is a desire to prevent the dissolution of the community and the partition of the community property. The charge which the husband has made is not only improbable in itself, but the accusation is sustained by not a scintilla of evidence. It was wantonly and deliberately made; his own witnesses testify to the good character of the plaintiff. A husband may be guilty of outrages towards his wife of character such as to render their living together insupportable without raising his hand against her—his conduct may be the very refinement of cruelty without either force or blows. (Ashton vs. Ashton, 48 Ann. 1199.) It is unnecessary to go into details of this matter.

The judgment in all its parts is correct, and it is hereby affirmed.

Rehearing refused.

No. 13,890.

SUCCESSION OF E. EVARISTE MOISE.

SYLLABUS.

1. The administratrix had authority to employ an attorney to defend a suit brought against the succession she represented. The amount of the fee is fixed and the privilege for its collection is recognized.
2. All the parties admitted that the fee of the notary contested was due in such a manner as to lead to the unavoidable conclusion that it was admitted as carried on the account of the administratrix.
3. "Provisions" to be secured by a privilege must consist of supplies made to the debtor or his family by retail dealers of provisions during the last six months.
4. A receipt showing payment in full of a judgment against a succession and subrogating the one by whom it was paid creates a *prima facie* presumption of a right which was not rebutted.
5. A claim for the reimbursement of amounts which were entirely in the nature of a personal obligation of the debtor is only subject to the prescription of ten years.
6. Facts and corroborating circumstances with the testimony of one witness sustain the claim of one of the creditors of the succession.

107	717
108	508
107	717
112	299

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7. An account, after the legal delays, may be homologated so far as not opposed, and the amounts claimed limited to the oppositions filed. Cross on Successions, p. 480.
8. The administratrix having acknowledged the claim of a creditor carried on her account, to the correctness of which she swore, and other corroborating circumstances and the evidence of one witness, were sufficient to sustain a claim for more than \$500.00.
9. An annuity was originally rightly credited and the judgment is amended only to the extent necessary to reinstate the claim, as that is all that is claimed under the pleadings.
10. Books of amounts received may be taken as proof against him who has written them.
11. The administratrix, in settling with one of the creditors, under the circumstances of this case, may invoke compensation against his claim, in case it appears that he owes the succession.

A PPEAL from the Civil District Court, Parish of Orleans—
Sommerville, J.

Benjamin Rice Forman, and John Wagner, for Administratrix, Rev. P. M. L. Massardier, Mrs. Ernest Pragst, Annie Collins, Herman Levy, Co-operative Publishing Co., B. R. Forman, Appellants.

Boatner, Dodds & Boatner, for Mechanics and Traders Insurance Co., Opponent, Appellee.

McCloskey & Benedict, for E. Curtis, Opponent, Appellee.

Dinkelspiel & Hart, for H. B. McMurray, Receiver of the A. C. Chevallier Pavement Co., Ltd., Opponents, Appellees.

The opinion of the court was delivered by BREAUX, J. .

On the application for rehearing by BREAUX, J.

BREAUX, J. This is an appeal from a judgment homologating a final account of the administration of the Succession of E. Evariste Moise.

The assets of the succession, as shown by this account, amount to six thousand seven hundred and thirty-two and 66-100 dollars (\$6,732.66), while on the other hand the debts secured by privileges,

Succession of Moise.

and the debts secured by mortgage amount to four thousand four hundred and fifty-three and 72-100 dollars (\$4,453.72), leaving a remainder of two thousand two hundred and seventy-eight and 94-100 dollars (\$2,278.94) to be divided among the ordinary creditors of his succession.

Oppositions were filed to this account and they were all passed upon by the learned judge of the District Court, who rendered judgment homologating the account, and afterward reopened the case, and on second trial rendered judgment from which the present appeal is taken.

The first question which is before us for decision grows out of the opposition filed to counsel's fee of two hundred and fifty dollars (\$250.00) for writing a brief and arguing before us the case of W. G. Taylor vs. E. E. Moise, 52 Ann. 2016. On the first trial the district judge allowed the amount without privilege; on the second trial he reduced the amount to one hundred dollars (\$100.00), secured by privilege. The services were rendered in the case before cited after the death of the defendant. No one can reasonably question the right of the administratrix to employ counsel and defend an important suit against the succession she, as administratrix, is called upon to protect and defend by every reasonable method within her control. She was unable to defend interests of the succession in court without the services of an attorney. The employment gave rise to a succession debt and as such was entitled to preference. This was the view of this court in a leading case upon the subject. It has always been followed since. *Friend vs. Graham*, 10 La. 439, as will be seen by reference to *Succession of Wells*, 24 Ann. 163; *Succession of P. O. Lauve*, 18 Ann. 723; *Succession of Whitehead*, 3 Ann. 396.

It being settled that the debt is one which is entitled to preference as to its payment, it only remains for us to determine whether or not the fee allowed by the District Court should be increased. The learned judge of the District Court, before whom the case cited, *supra*, was tried, said, in substance, that the case was defended by Mr. Forman with his usual ability and energy, and thought that his services rendered before his court were worth two hundred and fifty dollars (\$250.00). Taking this amount as a basis, the administratrix before the court contends that the services on appeal were worth an amount, at least, equal to that it is evident they were worth in the District Court. We are not inclined to that view. Usually less is charged as a

fee on appeal than for services in the District Court up to and including all duties performed in obtaining judgment. We agree with our learned brother regarding the zeal and ability of counsel, at the same time, for services here we think that one hundred and fifty dollars is a sufficient fee.

The amount of the fee is frequently made to depend upon the certainty of payment. Keeping this into account, we conclude to increase the amount to one hundred and fifty dollars.

The administratrix, through her counsel, says that item 26 of the account, six dollars and forty-two cents (\$6.42), an amount claimed was admitted in open court, and that the notary is entitled to a privilege. We are referred to page— of the record showing admissions made as follows: "The item of W. R. Ker, notary, for services, \$6.42, is admitted." The account had been homologated so far as not opposed, admitting this claim as due. It is secured by privilege. All parties to the suit admitted that it was a correct claim.

The next items opposed are items 29, 30, 31, 32, 36, 37, 38, 39, 40 of the account. On appeal the administratrix urges that there was error in amending her account by judgment, transferring these claims from privileged to ordinary. She urges that if the English word "provisions" is to have the same meaning as that word in French, viz: means of subsistence, then they are privileged. The item 31 is for a diary; item 30 for dry goods and clothing, and item 32 for shoes, underwear, and men's furnishing goods; item 39 for clothing; item 40 for dry goods; item 29 for excavating; item 37 for plumbing; item 38 for clothing; item 36 for hardware; they do not fall within the term provision as used in the Code.

The court said: "In the interpretation of the Article 3175 C. C. reference must be made to Article No. 5. Its language is "supplies of provisions made to the debtor or his family during the last six months by *retail dealers*, such as *bakers, butchers and grocers*." *Cook vs. Doyle*, 6 Ann. 276. This view of the court is controlling and excludes the definition of the word as found in French lexicography. The word provision is defined "A supply of food, that on which one subsists." *Standard Dictionary*. Subsists means to provide with subsistence that which supports life, or food." None of these items fall within the definition just stated.

Another of the creditors of the succession presented an opposition

Succession of Moise.

in which he claimed four different amounts. One of the amounts is represented by a promissory note carried on the account as due to one of the local banks. Opponent produces receipt of payment of a judgment, interest, and costs evidently obtained against the succession, for the receipt shows that the one paying the note was subrogated against all the "rights, actions, and mortgages against the late E. E. Moise and his succession arising from the note sued on in said above entitled cause." This receipt admitted in evidence without objection was *prima facie* proof of the amount claimed. No attempt was made in any manner to show that it was not the correct amount due. Another item of the claim of this opponent was for obligation of a personal character growing out of kindly offices shown by the opponent to the late E. E. Moise. It has nothing about it suggestive of business and, therefore, did not fall within the definition of an account or claim with the view to the least business transaction. We have not found that the district judge erred in allowing this claim after the deduction made by him. Being a personal obligation it was not barred by the prescription of three years pleaded.

The Merchants and Traders Insurance Co., in its answer to the appeal, asks that the judgment of the District Court be so amended as to allow it judgment for the sum of six hundred and thirty-three and 81-100 dollars. The account of the administratrix mentions this company as a privileged creditor in the sum of seventy-seven dollars (\$77.00) and as an ordinary creditor in the sum of five hundred and sixty-eight dollars (\$568.00.) In the account the seventy-seven dollars (\$77.00) is deducted from the ordinary debt, leaving four hundred and ninety-one and 56-100 dollars (\$491.56.) This opponent wishes to be recognized as a privileged creditor for seventy-seven dollars (\$77.00) and as an ordinary creditor for five hundred and fifty-six and 81-100 dollars, and to that end presented an amended petition claiming an increase to the sum of six hundred and thirty-three and 81-100 dollars (\$633.81.)

In the original opposition, no objection was urged against the amount carried on the account in its favor. It rested content with its opposition to some of the items carried to the credit of other creditors. The account, before the amended petition was filed, was homologated so far as not opposed. On the trial, evidence of this opponent was ruled out because offered too late, and the account had been homologated so far as not opposed.

It is urged that even as to the original claim carried on the account this company is not entitled to recover its claim because it is for an amount over five hundred dollars (\$500.00) and is not sustained by more than one witness. We think there are corroborating circumstances amply sufficient to establish this claim. The claim is sustained by the oath of the administratrix advising the court of this indebtedness in common with the others whose claims were credited. A part of the item for rent, secured by a privilege, was not disputed, and as to the remainder, the proof shows, as we think, that it was due.

With reference to the homologation of the account so far as not opposed, we can only say that it has become the practice to homologate an account so far as not opposed. Succession of Commagere, 38 Ann. 833. And afterward effect is given to this homologation to the extent of closing the issues growing out of other amounts the opponents claim. While the opposition may be amended to make it more definite, new issues cannot be raised by asking to be recognized for other or larger claims. To illustrate by reference to details: The claim of the opponent was carried on the account. In due time after the account had been filed, opponent filed an opposition to the claims of other creditors and did not object to the amount as carried on that account. After the account had been homologated this opponent then sought, by another opposition to increase its ordinary claim to \$633.81 (less \$77.00 secured by privilege.) Under rulings of this court, we do not see our way clear to hold that such increase can be allowed. To the maxim *ut finis litium* effect has heretofore been given. We have not found good ground to arrive at a conclusion different from that expressed in repeated decisions.

The next disputed item is an amount of five hundred and seventy-four dollars (\$574), claimed by Rev. Father Massardier for arrears of annuity due in accordance with the terms of a transfer of property by him to the late E. E. Moise. This amount was carried on the account. It was rejected and stricken out by the district judge. In our view this claim is due as made sufficiently evident by the testimony. Mr. Pfister, who was agent of Rev. Father Massardier, testified that he had not collected the amount. He had exclusive charge, and his uncontradicted testimony sustains the claim. An authentic act in evidence shows that Rev. Father Massardier was entitled to an annuity, and the testimony shows

Succession of Moise.

that he had not been paid during the length of time for which claim is made. It was carried originally on the account as an ordinary claim, and as such it is reinstated and to that extent viz.: five hundred and seventy-four dollars (\$574.00), the judgment appealed from is amended.

The next contention grows out of the opposition of H. B. McMurray, receiver of the A. Chevalier Pavement Company, Limited. The district judge rendered judgment in favor of this firm in the sum of one thousand one hundred and thirty-three and 60-100 dollars (\$1133.60) against the succession.

The account kept by the late E. E. Moise shows collections of one thousand nine hundred and forty-two 66-100 dollars, against which the administratrix claims credit for disbursements and charges in the sum of one thousand one hundred and thirty-five 59-100 dollars. Of this amount claimed by the administratrix as a credit, the district judge did not allow the sum of \$250.00 which Mr. Moise had credited to himself on account of attorney's fee. He also declined to allow him credit for costs paid for an appeal to this court and for printing the brief in which the receiver Jahncke was cast and dismissed from his trust. The district judge rightly ordered the amount paid over to the present receiver, contradictorily with whom the amount of credit may be adjusted.

The administratrix, through counsel, urges that if the books are introduced in evidence against the one who has written them, they must be taken together and cannot be rejected, when they contain evidence against the one calling for them. C. C. 2248. This, it is true, is the textual provision of one of the articles of the Code. In another article, just following, it provides that the books are proof against him. The debits and credits may be considered, we think, in determining whether balances are correct. The credits claimed by the accountant as carried on his books would not be conclusive proof. They should receive some corroboration.

We do not think the judgment should, as relates to this claim, be amended. The amount was collected by the predecessor of the present receiver. It is evidently due to the estate (subject to whatever charges may be sustained hereafter) and can be recovered by the opponent.

The administratrix complains of the judgment in allowing \$48.46 to W. G. Taylor as an ordinary claim for costs in the suit of Taylor vs. Moise.

The creditor filed an opposition to the account and asked for the

recognition of his claim with privilege, it being for costs of court due by the late E. E. Moise. This was granted by the district judge to the extent of recognizing the claim as ordinary. The administratrix here urges **that** the succession is a creditor of this claimant in a larger amount than his claim and that it should be held that *pro tanto* and that one claim compensates the other. There is no pleading setting forth this demand. Besides, the right of the administratrix is not prejudiced by the court's recognition of that claim. Compensation can be insisted upon under the circumstances of this case, after as well as before judgment. With reference to the privilege, this appellee has not appealed, and has not on appeal asked for an amendment of the judgment.

This brings us to the end of the issues involved in this litigation. It only remains for us to enter up a decree affirming the judgment of the District Court, after having amended it to the extent of allowing the claim of Rev. Father Massardier as an ordinary one and directing that it be reinstated on the account of administration as carried on that account originally, also by reinstating the account of notary's fee, \$6.42, as a privileged claim, and allowing B. R. Forman, attorney, one hundred and fifty dollars as a privileged claim, instead of the one hundred dollars heretofore allowed.

For reasons assigned, the judgment as amended is affirmed. Costs of appeal to be paid by the appellees.

ON APPLICATION FOR REHEARING.

BREAUX, J. The article of the Code of Practice leaves but little, if any, discretion to the court regarding the costs of appeal when the judgment is amended. Usually the least amendment of the judgment carries costs. For that reason in preparing our original decree we assessed the costs of appeal to the appellee.

On rehearing our attention having been called to the different interests involved in matter of the account and opposition and in view further of the fact that some appellants would be relieved from payment of costs of appeal who had obtained no relief, our decree heretofore handed down is amended by condemning the succession of E. E. Moise to pay all costs of appeal instead of appellees, as heretofore decreed.

With this amendment the application for a rehearing is rejected, and the amendment is made without granting a rehearing, as the parties have been heard and further argument is not deemed necessary.

No. 14,093.

CHARLES R. BELL VS. THE GLOBE LUMBER COMPANY, LIMITED.

SYLLABUS.

1. The master is not bound, absolutely, to his servants for the competency of their fellow servants, engaged in the same common employment, and is guilty of a fault, and becomes liable to the servant injured, only when the fellow servant, through whose incompetency, or negligence, the injury is inflicted, has been employed, or retained, with knowledge of his unfitness, or when the master has failed to exercise reasonable diligence and care to inform himself, and keep himself informed, as to his qualifications. Hence, a mere allegation of injury, caused by the incompetency, or negligence, of a fellow servant, imputes no fault to the master, and discloses no cause of action against him, and an exception to that effect should be decided before trial, if a decision is requested, and not referred to the merits. Hence, also, it is error to charge the jury that the "general allegation that the damage was caused by the employe is sufficient notice to the defendant that he knew of the incompetency of the employe."
2. Where, however, in such a case, the exception of "no cause of action" is referred to the merits, by the court, and, upon the trial on the merits, the defendant, without objection, permits evidence to be introduced tending to establish facts which, if alleged, would have disclosed a cause of action, he allows the ground upon which his exception is based to be taken from under it and, thereby, in effect, allows the petition to be amended and its defects cured.
3. Whilst the doctrine of the non-liability of the master for injury sustained by a servant in his employ, through the incompetency or negligence of another servant employed by him, has not been recognized in this State as including certain classes of cases to which it has been applied by the English, and by, some, American, courts, the ordinary case of a brakeman injured through the incompetency or negligence of an engineer, when both are engaged in handling the same train, in the service of the same employer, is one to which, under our jurisprudence, as well as the jurisprudence elsewhere, that doctrine is properly applicable.
4. Both reason and authority sustain the proposition that where the work for which the servant is employed is such as to involve risk to the lives and persons of others the master is required, upon engaging such servant, to make reasonable investigation into his character, skill and habits of life. And, where a company, operating a railway, employs a person as engineer and assigns him to the duty of running a locomotive, without requiring him to produce credentials of any kind, without inquiry, except such as is made of the person, himself, as to his competency for the discharge of that duty, and with no knowledge of him, save that derived from his having worked for it as a steam, and water, fitter, and machinist, such company is guilty of negligence, and is liable for injury resulting to a fellow-servant from the incompetency or negligence of such engineer.

107	725
108	870
107	725
121	184
107	725
125	1092

5. The general rule, no doubt, is, that, where a servant is aware of the incompetency of a fellow-servant and, nevertheless, accepts employment and works with him, without objection or notice to the common master, he thereby accepts the risk, so far as the master is concerned, of such incompetency. In the instant case, however, whilst it appears that the plaintiff, a brakeman, by reason of a limited experience in switching cars, upon the day of the accident, concluded that the engineer, who had been assigned to duty for the first time, did not know how to handle the engine, it also appears that, when the train was taken out, shortly after such switching, the superintendent of the road went on the engine, and the engineer, thereafter, acted under his orders, or in his immediate presence, or both. It is, therefore, held that, notwithstanding the opinion, or limited knowledge, of the brakeman, he had the right to assume that the company, itself, thus present, through its superintendent, would see that the duties of the engineer were properly discharged.
6. Where a train is made up of skeleton (log) cars, the footing upon which is precarious, it is negligence for the engineer to reverse his engine without warning, since he thereby subjects the brakemen, taken unawares, to the danger of being thrown off.
7. The plaintiff in this case lost a leg. He has been awarded, by the verdict and judgment appealed from, the sum of \$10,000. This amount is reduced to \$8000.

A PPEAL from the Second Judicial District, Parish of Webster—
Watkins, J.

J. Henry Shepherd and Lynn K. Watkins, for Plaintiff, Appellee.

Stewart & Stewart and William Rufus Cowley, for Defendant, Appellant.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

MONROE, J. This is an action in damages for personal injuries. There was a verdict and judgment for plaintiff in the sum of \$10,000, from which the defendant has appealed.

The plaintiff alleges, in substance, that he was employed as a brakeman on a short railway operated by the defendant for the purposes of its saw mill; that he was on a train which was under full headway, when, without warning of any kind, the engine was reversed and the speed of the train checked so suddenly as to throw him on the track, with the result that the wheels of the car passed over one of his legs, crushing it in such a manner as to necessitate amputation. Then fol-

low allegations as to his sufferings and impaired earning capacity, and he further alleges "that he was without fault and that the said injury is wholly due to the gross carelessness of the defendant company and the superintendent of the said company and the engineer and agents and servants of said company; that the superintendent gave the order to stop, to said engineer; that the stop was not at a usual stopping place, but was unusual; that the engineer was incompetent to operate a locomotive, and that by a proper handling of said locomotive petitioner would not have been injured."

The defendant filed an exception of "no cause of action," which, by order of the court, was referred to the merits. And, thereafter, "first reserving all rights under said exception," the defendant answered, denying generally the allegations of the petition; specially denying that plaintiff's injuries resulted from its fault; and averring that plaintiff was an experienced railroad man and assumed the risks incident to the service in which he was employed, including those resulting from any negligence of his fellow servant, the engineer. It does not appear that the defendant insisted that his exception of "no cause of action" should be ruled on, separately, and, upon the trial on the merits, evidence was offered on behalf of the plaintiff, to which no objection was interposed, showing the incompetency of the engineer. Counsel for defendant, however, requested the judge to charge that the simple allegation that the injury was caused by the negligence, or incompetency, of a co-employee, or fellow servant, is not sufficient and does not state a cause of action, unless it is further alleged that such negligence, or incompetency, was known to the employer."

The charge as given in response to this request was as follows: "Gentlemen of the jury, I have been requested to state to you" (repeating the charge asked). "I will state to you that, in the opinion of the court under the general allegation that the damage was caused by the employe that is sufficient notice to the defendant that it is contended that he knew of the incompetency of the employe who is charged to have been the cause of the damage. If they should, by omission, fail to make the allegations in the petition as strong as they should be, and if there is proof introduced which covers that defect, and that proof is introduced without objection, that it is omitted, in that case the portion of the evidence being received without objection completely cures the defects in that regard." To this, the defendant, through its counsel, reserved a bill of exceptions.

The facts, in addition to those stated, disclosed by the evidence adduced on the trial, are as follows:

The plaintiff was about twenty-six years of age, and had been working as a brakeman, and otherwise, on railroads, for fifteen years, or more, before he entered the service of the defendant. The defendant, being engaged in the lumber business, operates a railroad extending from "Yellow Pine," in Webster parish, some seventeen miles into the woods from which it obtains its logs. On the morning of July 7, 1900, a train, consisting of eight or ten skeleton cars, used for the transportation of logs, a coal car and an engine, with tender, was started from Yellow Pine, with McClurken as engineer, and Doogan as fireman, on the engine, and the plaintiff as brakeman, whilst Matthews, the superintendent of the road, and two other men, Buckner and Moody, were riding on the tender. The train moved out in inverse order, that is to say, the log cars were ahead, the coal car was behind them, then the tender, and, lastly, the engine, backing and pushing the other cars. In this situation, plaintiff's position, when not otherwise employed, was on the foremost log car. A log car, it may be stated, consists of two trucks, of four wheels each, connected together by two timbers, about six by eight inches square, running fore and aft on top of them, and projecting out in front and rear, between the ends of which, as we understand it, are the "drawheads." Across the trucks, and extending out upon either side of the track, are large, squared timbers, called "bunkers," which serve to support the logs, and, from the end of one bunker to that of the other, upon each side of this skeleton car, is a pole, from about the middle of which is fastened a chain, called a "toggle." These chains, when passed over the logs with which the car is loaded, and connected together, serve to hold the load of logs in place. When the train in question had progressed about two miles, Matthews observed that one of the toggles was dragging on the ground, and there was a halt, and the plaintiff was signalled to secure it in position. In order to do this he dismounted from his place upon the forward car and went back to the car to which the toggle was attached, and, after he had fastened it properly, got on the train again at that point, signalling, either just before, or just after, getting on, or, perhaps, before and after, for the train to move on, and, as the train acquired headway, he proceeded forward to his position, and was in the act of taking his seat upon the forward "bunker," of the forward car, when, as he claims, the engineer, without warning of any kind,

reversed his engine and thereby caused the "slack," resulting from the pushing of the train, to be drawn out from between the cars, successively, so that, when the reverse movement reached the car that he was on it produced a jerk, or snap, illustrated by the popping of the cracker of a whip, which, being entirely unexpected, precipitated him in front of the moving train, with the result, that his leg was crushed and amputated as alleged in the petition. Doogan, the fireman, testifies that the engine was reversed, exactly as the plaintiff claims that it was, as may be seen from the following excerpt: "Q. What called your attention to anything unusual about the train? A. A kind of motion by the engine being reversed. Q. Had there been any signal given notifying anybody that the engine would be reversed, A. Not that I seen, or heard of. Q. Where was Mr. Matthews at that time? A. He was on the engineer's side on that corner of the tank. Q. When you noticed this reversal, did you look at the engine to see what the trouble was? A. Yes, sir, I raised up and looked at the engineer, to see what he was stopping for. Q. What did you notice, what was the condition of the lever? A. He had his lever reversed, for going back the other way. Q. How long after that before you found out that Mr. Bell was hurt? A. Right immediately. Q. How did you find it out? A. Mr. Matthews hallooed to me to set up the brake, quick, that Bell was under the train. Q. That was after you saw the reversal? A. Yes, sir." White, a bridge foreman in the employ of the defendant, who was standing alongside of the train, testifies that as the cars passed him, after the plaintiff had secured the toggle, he called to the plaintiff to look out for a hand car, which, it seems, he had sent farther along the road, after which, he says (quoting his language): "I noticed that the slack was taken up in the train and I looked about for him, and, as I looked, I saw him pitch headforemost off the car," etc. Matthews had been riding on a "supply box," being a compartment of the tender, upon the side nearest the cab of the engine, with his back to the engineer and his face in the direction in which the train was moving. He says: "I noticed the toggle chain dragging the ground and I had the train to stop and Mr. Bell got off and fixed it up, and, after doing so, the train started, and Mr. Bell went over toward the last car, and the last I saw of him he was in the act of taking his seat on the bunker. About that time I saw Mr. White, and I motioned to give him an order, and, then, I noticed that Mr. Bell was missing, and I gave the signal to stop. * * * Q. State

when the engine was reversed as compared with your signal? A. Well, it was reversed just as soon as the engineer saw my signal. I was in the act of crossing the tank to speak to this man White when the signal was given." Buckner and Moody were riding on the rear end of the tender, the part most remote from the cab of the engine, with their faces in the direction in which the train was moving and their backs to the engineer. They testify that they saw Bell "pitch," or fall, forward, as he was in the act of taking his seat, but that they perceived nothing unusual in the motion of the train to produce that effect. They both testify, also, that they are not railroad men, and Buckner states that he has not had enough experience to know what the movements are or how an engine is reversed, and Moody, we infer, is not much better informed. McClurken, the engineer, testifies that he did not reverse the engine until he received a signal from Matthews to stop. He also testifies that, according to his recollection, White, as well as Matthews, and one or two others, were on the tender, and that Matthews crossed over to speak to some one on the side of the road.

The evidence shows that McClurken had been employed by the defendant, for several months before the accident, as a steam and water fitter and machinist, but, up to the day of the accident, had never been placed in charge of a locomotive. It further shows that, whilst he claimed to have been a locomotive engineer, and, at one time, a member of that brotherhood, and to have been so employed seven years before, he brought to the defendant no certificate to that effect, or clearance card, and that none were demanded of him, though such credentials are usually demanded by railroad companies employing engineers; and, it does not show that any inquiry was made as to his competency to discharge the duty to which he was assigned. That he was incompetent, is abundantly shown. He did not know how to use the injector upon the engine, and admits that he was obliged to call upon the fireman to instruct him in that respect, and the fireman was called upon to take the engine, with the injured plaintiff on board, back to Yellow Pine immediately after the accident. Later in the day, the engineer was given a further trial, and the fireman was obliged to intervene to keep the engine from running away, and, from that day forth, the engineer was never again placed in charge of an engine, by the defendant, and remained in its service but a few months longer. It is proper, also, to say in this connection that it does not appear that any witness in the

case had ever seen McClurken attempt to handle an engine until the day of the accident and that the plaintiff made the following statement in his testimony, to-wit: "As far as McClurken's ability as a machinist is concerned, I know nothing about that at all, but, as for handling an engine, I had a little switching with him that morning and I know, positive, that he was not competent to handle an engine." It should, further, be stated that, apart from the presence of Matthews, the superintendent of the road, the engineer controlled the train, as a conductor might have done, but that, the superintendent, being present, his was recognized as the paramount authority.

OPINION.

In order to entitle the plaintiff, in a case of this character, to recover, it is as necessary for him to allege, and prove, that the injury of which he complains was caused by the fault of the person upon whom he seeks to impose the liability as for him to allege, and prove, the injury itself. In this particular case the allegation of injury is specific enough, and the cause of the injury is alleged to have been the incompetency of the engineer and the improper handling of the locomotive resulting from that incompetency. As to the engineer, therefore, the allegation of fault, as the cause of the injury, is as specific as the allegation of injury. But, the engineer is not the defendant in the case, and it is only upon the assumption that his incompetency and negligence are to be considered the incompetency and negligence of the defendant, his employer, that we can find any fault imputed to the defendant. Whilst, however, the doctrine of the non-liability of the master for injuries sustained by a servant in his employ, through the incompetency or negligence of another servant employed by him, has not been recognized in this state as including certain classes of cases to which it has been applied by the English, and by, some, American, courts, the case stated in the petition; *i. e.*, the ordinary case of a brakeman injured through the fault of an engineer, when both are engaged in the handling of the same train, in the service of the same employer, is one to which, under our jurisprudence, as well as the jurisprudence elsewhere, that doctrine is properly applicable. *Hubgh vs. N. O. & C. R. R. Co.*, 6 Ann. 495; *Satterly vs. Morgan*, 35 Ann. 1166; *Town vs. R. R. Co.*, 37 Ann. 630; *Wallis vs. R. R. & S. S. Co.*, 38 Ann. 160; *Dandie vs. R. R. Co.*, 42 Ann. 689. Stating the doctrine thus referred to more specifically, for the

purposes of the instant case, it is, that an engineer and brakeman, employed by the same master and engaged in handling the same train, are fellow servants, each of whom, by virtue of his acceptance of such service, assumes the risks resulting from the incompetency or negligence of the other, and acquits the master from liability for the injury which he may sustain thereby; *provided*, the master has not employed, or retained, the incompetent, or negligent, one, knowing him to be incompetent, or negligent, or when, by the exercise of reasonable care, he might have informed himself as to such unfitness. It follows from this, that the incompetency, or negligence, of the engineer is not, *per se*, the incompetency or negligence of the defendant, and that the defendant was not, necessarily, at fault in having in its employ an incompetent engineer, since that condition might have existed notwithstanding the exercise, by the defendant, of all the care that the law requires; and, hence, it also follows, that the mere allegation, that the engineer was incompetent, and that through his incompetency the plaintiff was injured, imputes no fault to the defendant.

The general proposition, supported by the weight of authority, is thus stated: "In an action to recover for personal injuries to an employe, caused by the negligence or incompetence of a fellow servant, the complaint must allege negligence on the part of the master in employing such fellow servant, or in retaining him after his negligence or incompetency become known. A declaration merely alleging an injury sustained through the negligence of a fellow servant does not state a cause of action." Enc. Pl. & Pr., Vol. 13, pp. 899-900. "The general principle that the master is not liable for injury occasioned to a servant by the negligence of a fellow servant, in the absence of proof of fault or negligence in the employment or retention of the latter, may now be considered as firmly settled in Louisiana." Wallis vs. R. R. & S. S. Co., 38 Ann. 160. "Plaintiff cannot prove what he has not alleged." DeBuys vs. Farmer, 22 Ann. 479. "The principle that the *gravamen* is negligence, that is, the employment of an unfit servant, with knowledge, actual or constructive, of his unfitness * * * involves the corollary that a complaint is demurrable which merely alleges that it was the master's duty to employ careful and skillful servants, and that he failed to select those that were competent. A want of care and diligence should also be charged." Moss vs. Pacific R. R. Co., 49 Mo. 167. (Cited in notes to Smith vs. R. R. Co., 151 Mo. 397; 48 L. R. A. 393.)

If, therefore, the plaintiff in the case at bar had proved all that he alleges in his petition, and had been allowed to prove no more, he would not have been entitled to a judgment, since, whilst he alleges that the injury sustained by him resulted from the incompetency of the engineer, he does not allege that the defendant was guilty of negligence in employing, or retaining, the engineer. We think, therefore, that the exception of "no cause of action," if its decision had been insisted upon before trial on the merits, should have been sustained (*Robbins vs. Martin, Jr., et als.*, 43 Ann. 489), and that it was error for the trial judge to charge the jury that "the general allegation that the damage was caused by the employe is sufficient notice to the defendant that he knew of the incompetency of the employe." Upon the other hand, whilst it is true that the exception of "no cause of action" is not waived by going to trial on the merits, nevertheless, it may be rendered ineffective if the defendant, without objecting, permits the petition to be amended in such a manner as to supply the omission at which it is aimed; and so, if, upon the trial upon the merits, the defendant, without objecting, permits evidence to be introduced tending to establish facts, which, if alleged, would have disclosed a cause of action, he allows the ground upon which his exception is based to be taken from under it, since he, thereby, in effect, allows the petition to be amended and its defects cured.

"A party who, without opposition, suffers evidence to be adduced, contrary to, or beyond, the allegations contained in the pleadings, is bound by its effect, so that, after the admission of the evidence, it matters not if the judge should strike out that portion of the pleadings." *Hiennen vs. Gilman*, 20 Ann. 241; *Powell vs. Aiken & Gwynne et als.*, 18 La. 328; *England vs. Grison*, 15 Ann. 304; *New Orleans vs. Congregation, etc.*, 15 Ann. 389; *Barbet vs. Roth*, 16 Ann. 273; *Godden vs. Executors*, 35 Ann. 164; *McCloughery vs. Finney*, 37 Ann. 27. "If illegal evidence be admitted and a bill of exceptions taken thereto be not brought to the notice of the court the evidence will be considered." *Draper vs. Richards*, 20 Ann. 306.

We consider it unnecessary to add anything to what has been said in the preceding statement concerning the incompetency of the engineer, except to say that, whilst the defendant, through its counsel, insists that he was competent and that he was guilty of no fault in the matter

of the accident to the plaintiff, it seems to us significant that he was not permitted, after the accident, to take the engine back to Yellow Pine, a distance of about two miles, and that he was permanently relieved from duty, as engineer, so far as the defendant was concerned, upon the evening of the day upon which the accident occurred, although, as the evidence shows, a competent engineer was not, then, easy to find. Nor is it necessary that we should dwell upon the question of the care exercised by the defendant in selecting McClurken as its engineer, for, in truth, it cannot be said that any care was exercised. The record discloses no other authority than McClurken's own statement for the supposition that he had ever, until the day of the accident, attempted to run a locomotive, and it fails to show that the defendant made any inquiries as to his character or competency. He testifies that he had not before made such an attempt within seven years, and, although he states that he had been at one time a member of the "Brotherhood of Locomotive Engineers," he does not explain why, or when, he ceased to be a member of that organization, and he had no clearance card to support his statement that he had ever been a member, and he was accepted by the defendant and assigned to duty without being called on for a certificate or credentials of any description. Both reason and authority sustain the proposition that, where the service in which the servant is employed is such as to involve risk to the lives and persons of others, the master, upon engaging such servant, is required to make reasonable investigation into his character, skill and habits of life. 48 L. R. A. 376, *note*; 41 L. R. A. 82, *note*. In considering whether the inopportune reversing of the engine was the cause of the accident, we have regarded the testimony of Buckner and Moody as of little value. Not that we have any reason to suppose that they have not testified truthfully, according to their lights, but, because, being seated upon the rear end of the tender, with their backs to the cab of the engine, their faces turned in the direction in which the train was moving, and their attention attracted to what was going on in front (for they both testify that they were looking at Bell when he "pitched," or fell, forward, from the train), and because they were entirely unfamiliar with all phenomena connected with the handling of locomotives, it is not surprising that they did not see what the engineer, behind them, was doing, and that they did not, otherwise, recognize the fact that he had reversed his

engine, the more particularly as the effect of that movement was, necessarily, much less pronounced and violent where they were than upon the last, skeleton, car, at the other end of the train. As to the other witnesses: Doogan, who appears to be disinterested, although not an old railroad man, had had sufficient experience to enable him to recognize the effect produced by the reversal of the engine upon which he was working as fireman, and his testimony is clear, positive and unambiguous, that the engine was reversed, without warning; that it attracted his attention and that it preceded, and did not follow, the discovery of the misfortune that befell the brakeman. White, also, appears to be disinterested, and he testifies that, a moment after speaking to Bell, as the cars moved past him, he saw the "slack" being taken out, and, evidently realizing the effect that such a movement, advancing rapidly towards the front car, would be likely to produce, he looked about for Bell, and, as he looked, saw Bell "pitch head-foremost off the car." To this we have added the testimony of Bell, himself, an experienced railroad man, and the conceded facts, that the road was smooth, with the grade slightly inclined upwards, and that the train was moving at a rate not exceeding six or eight miles an hour. Upon the other hand, we have the testimony of the superintendent of the road (who, immediately afterwards, placed the fireman in charge of the engine, and, that night, summarily, discharged the engineer) to the effect that the engine was not reversed until after Bell had been thrown, or had fallen, off, and of the engineer to the same effect. It is a fact admitted by both of these witnesses, however, that, before Bell had fallen off, the superintendent had moved from his position on the supply box and had indicated, in a manner that was understood by the engineer, that he intended to speak to the man (White) whom they were approaching, and who was standing by the side of the road. Under these circumstances, it seems to us not unlikely that the engine was hurriedly reversed, whether in response to a signal given by Matthews or not, in order to enable him to accomplish his purpose. But, whether it was reversed for that, or for some other, reason, the jury, who saw and heard the witnesses, evidently believed that the reversal of the engine was the cause of the accident, and we are of the same opinion. It is said, however, that Bell knew of the incompetency of the engineer before entering into fellow service with him, and, hence, must be held to have assumed the risk incident thereto. It is no doubt true, generally speaking, that a

servant who is aware of the incompetency of a fellow servant and who, nevertheless, voluntarily, enters into fellow service with him, assumes the risk incident to such incompetency. But, in this particular case, it will be remembered that Bell's conclusion as to McClurken's incompetency was based upon a limited "switching" experience upon the very morning of the accident and had, therefore, scarcely a sufficient basis to justify a serious conviction that it would be unsafe to go out on the road with him. Beyond this, Bell knew that McClurken was going out for the first time and that the superintendent of the road was going, on the engine, or tender, with him, and, we think he might fairly have presumed that the purpose of the superintendent was to protect the property and employes of the road from the inexperience and, possible, incompetency of an engineer who was untried and, so far as his competency was concerned, was unknown. It may be said that the defendant, through its superintendent, was, itself, present on the engine, and that the fault committed by the engineer, having been committed in its presence, was committed by it, and not by the fellow servant of the plaintiff. There is no doubt that the engineer was acting directly under the instructions of the superintendent. It was by the order of that officer that the train had been stopped in order that the "toggle" might be picked up; and, according to his testimony, it was by his order that it was stopped, a few moments later, that assistance might be rendered to Bell. He was so near to the engineer that his orders were communicated by word of mouth, or by visible signs, and, being so near, was in a position to see that his orders were so executed as not to endanger the lives of others, and the responsibility rested on him to see that they were so executed. Equally, we think, did the responsibility rest upon him, considering the circumstances of the case, to see that the duties of the engineer, whether discharged under specific orders from him, or otherwise, were properly discharged, since the defendant, of which he was the representative, had seen proper to assign to the discharge of those duties a person concerning whose competency it was ignorant and had made no inquiry, but whose incompetency to handle a train the superintendent had been afforded a better opportunity to find out, during the run from Yellow Pine to the place of the accident, than had ever been afforded to the brakeman.

The evidence shows that Bell was earning from \$1.75 to \$2.20 a day at the time of the accident; that his leg was crushed, practically, off.

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and was subsequently amputated, and reamputated, and that, whilst it was not entirely sound at the date of the trial, he was, nevertheless, at that time, enabled to earn, in some way, an average of about \$7.00 a week. After the verdict and judgment in his favor, he died, and his widow and minor children have been made parties to the appeal. The verdict of \$10,000 is rather larger than this court has been in the habit of affirming in similar cases, and we think should be reduced. It is, therefore, ordered, adjudged and decreed that the amount allowed by the judgment appealed from be reduced from \$10,000 to \$6000, and that, as thus amended, said judgment be affirmed, in favor of Mrs. Lillian Bell, as widow of the original plaintiff, and as natural tutrix of the minor children, Gertrude, Lillian, Harvey and Charley Bell, issue of her marriage with said original plaintiff, now deceased. It is further ordered, adjudged and decreed that the costs of the appeal be paid by the appellees, and those of the district court by the defendant.

Rehearing refused.

No. 14,034.

JOS. P. MARTINEZ VS. JAMES P. WALL ET ALS.

107	737
115	374

SYLLABUS.

The objection to an acceptance of title raised by an adjudicatee of property sold under a judgment of partition that one of the joint owners of the property had not been made a party to the partition proceedings, will not be sustained where the evidence shows that the interest which is alleged to have been not represented was that of a presumptive heir in a succession opened in 1877, and whose existence was then unknown and continues still to be unknown. Under such circumstances a partition sale made contradictorily with the co-heirs of the absentee, under decree of court, will protect the purchaser.

I N RE Jos. P. Martinez applying for *Certiorari*, or writ of review, to the Court of Appeal, Parish of Orleans, State of Louisiana.

James Wilkinson, for Applicant.

Frank E. Rainold, for Mrs. Johanna Phillips, Respondent.

The opinion of the court was delivered by

NICHOLLS, C. J. The property involved in this litigation was adjudicated on the 13th of July, 1888, to the State of Louisiana, in pursuance of the current revenue law of 1882, for alleged delinquent taxes of the year 1887, which taxes were assessed against the property as that of Mary Agnes Wall, individually.

On the 25th of October, 1889, it was adjudicated at a sale made by the tax collector at the instance of the State, in pursuance of Act No. 80 of 1888, to James C. Galvez. Galvez transferred the property in June, 1893, to Joseph P. Martinez, and the latter transferred it in August, 1893 (retaining a counter-letter showing that the sale was simulation), to Antonio Marti. On the 30th of April, 1894, Marti filed a suit in the Civil District Court in which he alleged the above facts and averred that he was the owner of the property and entitled to the possession thereof.

That Mary A. Wall was in the wrongful and illegal possession thereof. He prayed for citation upon her and that, contradictorily with her, he be decreed the owner of the property and placed in possession thereof, and in the alternative that there be judgment in his favor for \$256 for reimbursement of taxes paid by him on the property, which payment had enured to defendant's benefit.

Defendant answered, pleading the general issue and averring that she was the owner of only an undivided interest therein. She alleged that the property belonged to her two brothers and herself in indivision; that if she were the owner of the whole, the tax sale on which plaintiff's title was based, was null and void, being an assessment in the name of a party other than the owner. Plaintiff pleaded the prescription of one, two and three years against any attack upon the sale.

The District Court rejected the plaintiff's demand and he appealed from the judgment to the Court of Appeal, Parish of Orleans. That court affirmed the judgment, and the cause was taken on a writ of review to the Supreme Court, which rendered an opinion and judgment which will be found reported in the 51 Annual as Antonio Marti vs. Mary Agnes Wall.

The decree of the Supreme Court was that the judgment of the Court of Appeal and that of the District Court be so amended as to decree the sale of the property in dispute null and void as to one undivided

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half interest, and good and valid as to the other undivided half interest; that in other respects the judgment be affirmed.

The only defendant in that case was Mary Agnes Wall, one of four children of Julia Wall. The property was owned by *Julia Wall* at the time of her death in July, 1877. The three other children of the deceased were sons—one of whom (Patrick J. Wall) had disappeared about 1874 and had not been heard from after that time up to the date of Marti's suit. The succession of Julia Wall was opened and placed under administration, with one of the sons (Thomas J. Wall) as administrator. It was under administration at the time of the tax adjudication to the State. Thomas J. Wall died subsequently and no attempt was made to reopen the succession. Mary Agnes Wall bought out the interest of the other son, James J. Wall. She and her brother, James J. Wall, resided continuously upon the property up to the institution of the suit of Marti against her. No judicial proceedings were taken of any kind looking to the placing of any property which the absentee, Patrick J. Wall, had in Louisiana, either in the *provisional possession of his presumptive heirs* or that of a curator. Whatever property he had remained untouched and unrepresented throughout. Mary Agnes Wall did not claim to represent him, or to hold under or through him in any way. When sued, she disclaimed doing so. The decree of the Supreme Court said nothing as to its effect upon the possession of the property. It left that matter to be fixed by the legal results which would flow legally from it. After the decree became final, Joseph P. Martinez, who had never in reality parted with his title, caused himself to be placed of record as the real party in interest in lieu and place of Marti.

He then instituted a suit in partition of the property against Mary Agnes Wall and her brother, James J. Wall. In this suit he alleged himself to be the owner of an undivided half of the property, and the two defendants together the owners of the other undivided half. They excepted that though they held an interest in the property (evidently by inheritance) of a share in the succession of the deceased brother, Thomas J. Wall, that they did not own the interest of the absentee, Patrick J. Wall, and it was necessary that interest should be represented in the proceedings—that he should be made a party. The exceptions were referred to the merits.

The District Court rendered judgment in favor of the plaintiff, Martinez, and against Mary A. Wall and James J. Wall, decreeing a

partition of the property and ordering it to be sold at public auction to effect that partition on such terms as the parties might agree upon.

Later on, on joint motion of plaintiff and defendants, the property was ordered to be sold by the civil sheriff of the parish on terms which they had agreed upon.

The property was offered for sale and adjudicated to Mrs. Johanna Phillips, but she refused to comply with the bid.

A rule was taken upon her at the instance of the plaintiff and of the two defendants to show cause why she should not be required to accept title and pay the price.

The answer of the adjudicatee is not in the record, it having been mislaid, but there is no dispute between the parties as to what the defenses were. She urged that no tender of the property had been made to her and that the title offered was not a good one; that she could not safely take it in view of the outstanding rights and interest of the absentee, Patrick J. Wall. The District Court ordered her to accept title and comply with the bid, and she appealed to the Court of Appeal. That court reversed the judgment and the plaintiff has brought the correctness of that judgment before us under a writ of review.

Plaintiff maintains that the proceedings were valid and legal in manner and form as taken; that Patrick J. Wall disappeared before his mother's death; that there is nothing to show that he is alive; that if he be still alive he has manifested no intention to accept his mother's succession, although she died as far back as 1877; that there is nothing to indicate that if alive he ever will accept it.

That there is every reason to believe that he is dead; that rights of parties should not be held in abeyance upon mere possibilities; that if he should appear and accept the succession and have any rights in the premises he could look and should look to his co-heirs for his proportion of the price of the property which they may have received, and not to an interest in the property which in the meantime has been sold in partition proceedings; that the defendants having accepted the succession of their mother could not divide the acceptance, but could only take the succession as a whole; that, they being in possession and Patrick Wall not having been heard from, they must be held and taken to be the sole heirs *quoad* legal proceedings taken out and completed, before he makes an appearance, and so far as third parties who have acted on the faith of legal proceedings are concerned.

Appellee contests the correctness of these propositions. She insists that there is no presumption whatever that Patrick J. Wall is dead; that he is not old enough to warrant such a presumption; that there could have been no warrant or justification for opening his succession; that the defendants took no proceedings to be placed in provisional possession of his property, as they might have done and should have done under Article 57 of the Civil Code; that the possession which they have held of the property has been a possession on their own account as part joint owners and not through and under their brother Patrick; that, so far from claiming that they held possession under and through him, they not only have disclaimed claiming his rights, but have admitted them to be still outstanding and valid; that the question of the indivisibility of their acceptance of their mother's succession could not arise unless nor until Patrick J. Wall had been affirmatively shown to have died, and died without heirs, or being alive that he had renounced his mother's succession; that there has been no sufficient interval between the mother's death and the present time to have cut off his rights by prescription, and he might reappear and successfully claim his share of the property; that as the sale has not been consummated, and she has not yet gone into possession, she is entitled to full protection.

It will be noticed that James J. Wall and Mary Agnes Wall, the defendants in the partition suit, after objecting to it—the partition—on the ground of the legal necessity of Patrick J. Wall being made a party to the proceedings, finally consented to it, and have now joined with the plaintiff in insisting that the purchaser should comply with her bid. The only party now complaining is the adjudicatee. We have, very recently, in *Childs vs. Luckett*, referred to the fact that objections to the legality of judicial proceedings, leading up to a judicial sale, can be much more strongly urged by a purchaser who has not yet gone into possession of the property under the sale.

We have examined the situation carefully. We do not think that the appellee can expect to be released from her bid because the title to the property may not be absolutely perfect. She has the right, however, to demand one reasonably safe. In dealing with this matter, we think we are authorized to take into consideration not only the proceedings themselves, but the probability or likelihood of their being attacked. Patrick J. Wall disappeared two or three years before his mother died. His whereabouts were unknown. He has made no appearance since. There

is no certainty as to his being dead, either at the time of the opening of his mother's succession or now. The most that can be said is that his existence was then and is now *not known*. We understand the law to be with reference to property which is actually vested in an absentee at the time of his disappearance, that it shall be first placed under the administration of a curator, and after a certain lapse of time placed in the *provisional possession* of his presumptive heirs on their application. The ownership of the property is not lost to the absentee by his mere disappearance, and his continued existence being unknown he is deemed to be its owner and it has to be dealt with from that standpoint until it ceases ultimately to be his under the circumstances and conditions fixed by law.

The rule is different as to "successions which shall be opened in favor of a person whose existence is not known." As to these, Article 77 of the Code declares: "In case a succession shall be opened in favor of a person whose existence is not known, such inheritance shall devolve exclusively on those who would have had a concurrent right with him to the estate or those on whom the inheritance should have devolved, if such person had not existed."

The words "whose existence is not known" gives a well-defined meaning; they do not refer to a person temporarily absent who may or may not be alive at the time of the death of another of whom, if he were present, or his existence known, he would be a legal heir. They refer to one whose absence has been so long prolonged and under such circumstances as to throw great doubt upon his existence, and great doubt as to whether he would afterwards be heard from.

A succession so devolving upon others by the disappearance of a presumptive heir is not lost to the latter. Article 78 declares that the provisions of the law on that subject do not affect his right of claiming the inheritance and any other rights which the absentee or his representatives or assigns may have, that these shall be extinguished only by the lapse of time which is established by prescription. In the meantime, however, the parties upon whom the succession has devolved are deemed the sole heirs and third parties are authorized to deal with them as such. While the returning heir is entitled to recover (C. C. 1031) his rights, he does so without prejudice to the rights which may have been acquired by third persons upon the property of the succession or lawful acts done by those having control of it. Article 1381 of the

Code declares that if, after the partition, an heir appears whose death has been presumed on account of his long absence, or whose right was not known, as if a second testament unknown until then should entitle him to inherit with the others, the first partition must be annulled and another must be made of all the property *remaining in kind*, and the value of whatever has been consumed or alienated, in order that he may have the share of the whole to which he is entitled. A case resembling this in some of its features is that of *Union Bank vs. Choppin*, 46 Ann. 629. In *McCulloh vs. Minor*, 2 Ann. 468, this court said: "It is the interest of the State that real property should have a visible and responsible owner. When heirs choose to relieve themselves from the charges of ownership and the payment of the debts of the succession, and await in security the improvements of property falling to them through the labor and enterprise of others, the law has wisely held that they should not be permitted to use their rights to the manifest injury of others."

The distinction which we have referred to between the relation of an absentee to property already vested in him at the time of his disappearance, and that which would have devolved upon him if present or his existence were known, is recognized in the French authorities. In *Dalloz vs. Verge*, No. 20, under Article 36 of the Code Napoleon, corresponding to our Article 77 of the Civil Code, it is said: "Les articles précédemment commentés ont pour objet les biens que l'absent a laissés en s'éloignant de son domicile; les Articles 135 and 136 s'occupent des droits qui se sont ouverts depuis sa disparation." (J. G. Absence, 476.)

The position taken at the present time was not advanced at the trial of the case of *Marti vs. Wall*, in the matter of the tax adjudication. Miss Wall admitted the existence in the property of a right of joint ownership thereof of Patrick J. Wall and disclaimed making a claim to it. That recognition and admission may be of service to him should he ever return, but the issue here is not between Patrick Wall and his brother, nor between Martinez and the two defendants Wall, but between all three of them and the appellee, Mrs. Phillips, and the only question which we are to determine is whether or not the adjudicatee can safely take title to the property she has bought. We think she can safely do so.

Although unnecessary so to do, for the purposes of this case, it may not be amiss to say that it has been held in France that a recognition

In re Emancipation of Begue.

by the party upon whom a succession has devolved by reason of the disappearance of the presumptive heir of the rights of that heir may be withdrawn under some circumstances. Patrick J. Wall is still absent; no claim has been advanced on his behalf, either by himself or any one claiming under him, adversely to his brother and sister, now before the court. There is no reason to suppose that any claim will be presented. We see no reason why the latter may not stand upon their exact legal rights in the premises under existing conditions.

For the reasons assigned, 't is ordered, adjudged and decreed that the judgment of the Court of Appeal, brought before us for review in this case, be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the judgment of the District Court rendered in this cause, be and the same is hereby affirmed.

No. 14,000.

IN RE EMANCIPATION OF MARY ANN BEGUE.

SYLLABUS.

Where, to a preponderance of evidence, to the effect that a female minor, applying for emancipation, is capable of taking care of herself and her property, is added the opinion of the trial judge, before whom she has testified, to the same effect, and it also appears that the tutor, who is not related to his ward, is unable to take her into his house, or to exercise personal supervision over her, a judgment of emancipation will not be disturbed.

A PPEAL from the civil district court, parish of Orleans—*Ellis, J.*

Theodore Cotonio, for emancipated minor, plaintiff, appellee.

Levin DePoorter, for dative tutor, defendant, appellant.

The opinion of the court was delivered by

MONROE, J. This is an appeal taken by the dative tutor of a minor from a judgment decreeing the emancipation of his ward. The appellee files an answer claiming damages for frivolous appeal. The objection which the tutor raises is, that his ward is not capable of taking care of her estate, and that there is an outstanding interest in a suc-

cession which he wishes to realize in order that her affairs may be in a more satisfactory condition when they are turned over to her administration. There are several witnesses and, among them, two married ladies, relatives of the minor, who testify that she is competent to take charge of her property, and their opportunities of judging appears to us to have been better than those of the tutor, who is not related, since she has resided with them, whilst the tutor has not been in a position to offer her a home in his house, nor does he appear to have supervised her movements or conduct.

The minor, who is past eighteen, made a favorable impression upon the judge *a quo*, who says, in his reasons for judgment, "All that I saw of her and all that the witnesses said of her make it almost sure that she is as well capable now, in her 19th year, of caring for herself and her property interest as she will be two years hence," etc.

The tutor is the only witness who doubts her present competency, and his objection to her emancipation seems to be predicated not so much upon that ground as upon his desire to realize the outstanding asset and get the estate in "ship-shape," as he expresses it, before turning it over. The estate, it may be remarked, amounts to about \$800.00, and may amount to a few hundred dollars more. Upon the whole, we find no reason for disturbing the judgment appealed from. Nor do we find any reason for awarding the damages claimed.

Judgment affirmed.

No. 14,060.

GUARANTEE TRUST AND SAFE DEPOSIT COMPANY VS. WILLIAM J. HOLZELL.

SYLLABUS.

1. The timber was taken from one of two tracts of land. On the land of plaintiff this timber was large, and corresponded in every particular with the timber it claims as having been taken from its land; on the other, from which the defendants claim the trees were removed, there was very little timber and it was small in size. The defendant admitted that he had taken timber from the plaintiff's land, but failed to settle for as much as he had taken.
2. The weight of the evidence is with plaintiff, and for that reason defendants are held to pay an amount equal to the value of the trees at the time they were sold.

3. Fifteen hundred logs were sequestered. Six hundred and forty-two logs had already been paid for, and the defendants owe for the remainder, viz, calculating three logs for each tree, which appears to be generally the number of logs usual to the tree.

A PPEAL from the Sixth Judicial District, Parish of Ouachita--
Hall, J.

John Merritt Munholland and Andrew Augustus Gunby, for Plaintiff, Appellant.

William Francis Millsaps, for Defendant, Appellee.

E. Tyler Lamkin, for Intervenors, Appellees.

The opinion of the court was delivered by

BREAUX, J. Plaintiff is the owner of lands in Ouachita Parish. It charged W. J. Holsell, defendant, with having appropriated a number of trees it valued at three thousand dollars, for which it sues, also for damages to the land in the sum of eight hundred dollars.

The trees, plaintiff avers, were unlawfully cut on its land by the defendant, by whom they were taken and appropriated. Plaintiff further avers that the defendant has acknowledged the trespass on its land by paying for six hundred and forty-two sticks or logs of the timber, but that he has not paid for all that he has unlawfully appropriated.

On plaintiff's suggestion and for its account, some fifteen hundred logs were sequestered, which plaintiff avers were in defendant's possession. Dodge and Sundberry intervened in the suit and claimed to have bought these logs from the defendant and to have acquired the right of ownership before the trees had been sequestered.

The defendant controverts plaintiff's right to recover the amount claimed. His contention in defense was that he had paid for the logs and that the other logs sequestered had not been removed from plaintiff's land, as it contended, but that he had bought them from Lee Harris, the owner of a quarter section of land adjacent to plaintiff's. The District Court reached the conclusion that the evidence sustained the defendants and intervenors in their defense, rejected plaintiff's demand, and dissolved its writ of sequestration. Plaintiff appeals.

Plaintiff, in the first place, complains of the ruling in the District Court excluding testimony which it offered to prove that the interve-

nors were fully advised that the timber was the property of plaintiff, and testimony also to prove that one of the defendant's vendors, Lee Harris, had not been sincere in his dealings with plaintiff and representations to its agents, Cooper and Armstrong.

We take it that the objection made to the judge's ruling in excluding the testimony is to be considered as part of the argument; that it is to be considered only in that light, and that the plaintiff does not insist upon a remanding of the case to admit the excluded testimony.

Plaintiff's counsel closes the argument upon this point with the statement that whilst plaintiff was placed at a disadvantage by the ruling, none the less the record contains ample proof to enable this court to do justice in the case. We take it from the conclusion of plaintiff just stated that plaintiff submitted its case on the record as now made up and that it does not wish the case remanded.

All the timber, it appears, was cut from Section 17, owned by plaintiff. Defendant acknowledges that he had cut the timber from this land, but fixed the quantity at six hundred and forty-two logs.

Plaintiff's agent, W. L. Cooper, testifies that defendant admitted to him that he had cut all the pine timber cut on Section 17, which he stated was six hundred and forty-two sticks, for which he was willing to pay. A survey was made of the land and this witness made an estimate of the number of trees cut and fixed it at four hundred and twenty-six trees. This estimate, if taken as correct, shows a larger number of trees taken than was reported by the defendant. In making this estimate, this witness testifies that he counted all the recently cut stumps; that about three years previous, timber had been cut on the land; that the bark from the stumps of the old cuts had fallen off and could be easily differenced from the stumps cut within three to six months preceding. The bark had not fallen off the recent stumps.

A second witness for plaintiff, S. I. Wall, assisted Cooper in making the estimate, and explains how it was made. In the argument, we were informed that this witness is a respectable farmer living in the neighborhood of the land on which the defendant is charged to have trespassed. He says that defendant had his logging camp about the center of Section 17. He saw the wagons hauling the pine timber away, "said to be" defendant's wagons. As well say here that another of plaintiff's witnesses testified that all the wagon tracks converged to the place at which defendant rafted the timber.

The defendant, on the other hand, contended in the lower court, as he does in this court, that about twelve hundred and thirty of the logs sequestered were bought by him and hauled away from the land of Lee Harris. We refer to this contention at this time because this witness was introduced by plaintiff to prove that the number of logs removed from Lee Harris' land was less than the number for which defendant Holsell contends and consequently that the number of trees taken from Section 17 must have been larger than defendant admitted. The larger the number of trees hauled from the Lee Harris land, the less the number taken from plaintiff's land. It will be borne in mind that the raft sequestered had logs hauled from the one tract or the other.

This witness, Wall, had, about seven years before, bought all the merchantable timber on this Harris land. He afterward qualified this by stating that the timber he removed was timber twenty inches in diameter, and thereby gives rise to the inference that he did not buy all the merchantable timber, as it appears that there is merchantable timber having trunks less than twenty inches in diameter.

Another witness for plaintiff, son of Wall before named, testified that men working for defendant began to cut on Section 17 early in the fall of 1899 (these men remained until spring); that he saw no one else cutting timber on this land. This witness also helped to remove timber for Holsell from the Harris land adjacent, and did not think that it was possible at the time to find more than one hundred thousand feet remaining on the Harris land. He saw defendant's timber after it had been sequestered; it was large timber, measuring in diameter from eighteen inches up.

Mr. Hay, another farmer residing near Section 17, testified that there was little timber on the Lee Harris tract and that small. He offered only fifteen dollars for it before defendant began cutting timber.

This brings our summary of the testimony of plaintiff's witnesses to a close.

Defendant, W. J. Holsell, died after suit had been brought. The legal representatives of the succession were properly recognized as defendants in this suit. His brother, as a witness, says that the six hundred and forty-two logs paid for by defendant were the number removed from plaintiff's land. He knew this, he said, because he made careful measurement of the timber at the time in order to settle with Lee Harris as the Drew Investment Company's agent. Another employee is

equally as positive and accounts for his certainty by relating an incident in connection with the work. In this he is corroborated by a fellow workman. The witnesses for the defendants controvert the statement of those of plaintiff about the number of trees on the land of Lee Harria. They fix the number at twelve hundred and thirty cut on this land. They testified that they counted both the trees cut on plaintiff's land and the trees cut on the Harris land and gave the exact figure of each.

We close the transcript in the case after our examination, feeling convinced that the former defendant, the late J. W. Holsell, had cut a larger number of trees than that for which he paid plaintiff.

The two witnesses for the plaintiff went on the ground and counted the trees cut on Section 17. Two of the witnesses for the defendant had previously counted them. There is a great difference between the former and the latter. We are inclined to accept the count of freshly cut stumps made by the two witnesses for the plaintiff because it received considerable support from other facts revealed by the record. They are: that the preponderance of the testimony shows that there was only little timber on the land of Harris; that it was smaller in diameter than the diameter of a large number of the trees in the raft sequestered; the Harris timber had been cut and culled. He had only small timber; defendant's witnesses do not prove by their testimony that they knew the lines of the respective owners of these lands; while the timber on Section 17 was thick, large and fine timber from which it was not difficult to remove timber measuring twenty inches and up in diameter; and, lastly, because W. J. Holsell said to Cooper, plaintiff's agent and witness whose testimony the record does not impeach that he "cut all of the timber that was cut on Section 17."

Defendants seek to give additional strength and force to their testimony by reference to the fact that it discloses that two of their witnesses while working together engaged in a friendly contest with two others also engaged in sawing trees into logs as to which would cut the most timber, and in that way they account for having kept a tally. Ordinarily, this manner of keeping an account should not outweigh the testimony of men who had made it their business to find out and count the number of trees felled.

True, in addition to these workmen, a witness, Harris, testified. The record discloses that defendants referred to this witness (either person-

ally or as the agent of the Drew Investment Company) as the one from whom the late J. W. Holsell, the original defendant, had obtained the authorization to cut trees on Section 17. This witness denies that he ever gave any such consent to the defendant, J. W. Holsell, and contradicts in this important particular one of the Holsells and one of their witnesses, as well as the averments of defendants' answer. Defendants would scarcely invoke the testimony of the witness Harris as corroborating them in any other particular. This witness, we note, testified that about eight hundred logs were taken from his place and that four logs to the tree was about the average.

If that be the number of trees removed from the Harris land, the number taken from Section 17 must be, at least, equal to that allowed by our decree,—four logs to the tree, equal 200 trees; on that basis the remaining trees were not cut on this land.

Be this as it may, the testimony of other witnesses stripped that of Lee Harris of all importance as a witness for defendant in this case. Lastly, on this point the timber sequestered was above the average in diameter and larger than was left on the Harris land after the trees had been culled and moved away and this before defendant commenced working the two tracts before mentioned.

We pass from consideration of the number of trees cut on plaintiff's land and take up the question of amount to which plaintiff is entitled. It is contended by plaintiff that the owner whose trees have been cut without his consent has the right to seize and recover the timber as his property wherever found (Vol. 28, p. 566, of the first edition of the American and English Encyclopedia of Law) and to damages actual and exemplary. We are not inclined to the view that plaintiff is entitled to more than the actual value of the trees at the date they were sequestered. This is not a case of aggravated trespass. From the brief of plaintiff we quote as expressing our own view upon the subject.

"It is charitable to presume that defendants' witnesses did not know where the lines were and therefore testified simply as to what Lee Harris told them as to where the lines run." We are of the opinion that under the circumstances the defendant rendered himself liable in damages to the amount of the value of the property. *Grevenberg vs. Borel*, 25 Ann. 530; *Marin vs. Satterfield*, 41 Ann. 742. We take it that the amount for which the logs were sold by defendant fairly shows their value.

As relates to the damages to the land, plaintiff's contention is that when land is injured by the cutting or destruction of trees such injury may be taken into consideration in estimating damages. We think it answer enough to say that the trees were full grown timber trees and that in such a case the damage is usually the value of the trees.

Plaintiff has already received one hundred and sixty dollars, as before stated. The defendants must be held to pay this balance—i. e., seven hundred and eighteen 64-100 dollars—or deliver to the proper authorities the logs to be sold. *The intervenor having acquired no right which can be sustained as against plaintiff, the demand set up by this intervenor must be rejected. The property had not been delivered when it was sequestered and none of the logs had been paid for.* Four hundred and twenty-six trees were cut on Section 17 (transcript, p. 60). Two hundred and ten trees were paid for. Two hundred and sixteen trees are due, or six hundred and forty-eight logs, worth the amount stated in our decree, on the basis of three logs to the tree, which we take that the evidence shows is correct.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is reversed, annulled, and avoided, and the judgment is hereby rendered in favor of plaintiff and against defendants for the sum of seven hundred and eighteen and 64-100 dollars (\$718.64), with interest from judicial demand.

It is further ordered, adjudged, and decreed that intervenor's demand be rejected.

Defendants are condemned to pay the costs of the District Court, the intervenors their costs in that court, and further that defendants and intervenors and appellee pay each his costs of appeal.

Rehearing refused.

No. 13,733.

E. A. BILLET VS. THE TIMES-DEMOCRAT PUBLISHING COMPANY.

SYLLABUS.

1. In an action for damages for libel, where "privilege" is set up as a defense, the evidence should be confined to the question of privilege, *vel non*, save in so far as it may be admissible in mitigation of damages.
2. In such a case, an amendment setting up the truth of the alleged libel in justification, may be allowed, if the offer to amend be reasonable as to time. The defense is not inconsistent with that of "privilege," and there is no change of issue in the sense of substituting one issue for another.

107	751
120	1023
107	751
1122	187

3. Reports made by police and detective officers to their superiors and inscribed in books kept for that purpose are not judicial proceedings and no privilege protects their publication. Nor, does any privilege protect the publication of the opinions, suspicions, or deductions, of such officers, otherwise imparted, whether to their superiors or to other persons.

A PPEAL from the civil district court, parish of Orleans—*Ellis, J.*

D. M. and Allan Sholars, for plaintiff, appellant.

Lawrence O'Donnell (Denegre, Blair & Denegre, of counsel), for defendant, appellee.

STATEMENT.

The opinion of the court was delivered by

MONROE, J. Plaintiff sues for damages for injury alleged to have been sustained by reason of the publication in the "Times-Democrat," a newspaper owned and controlled by the defendant, of the following article, which he alleges is malicious, wanton and defamatory, to-wit:

"LOST MONEY FOUND.

"The \$500 Which Mysteriously Disappeared from Mrs. Behm's Safe Strangely Recovered.

"A case where great protestations of love and breach of trust figured was developed last Sunday, when the local police authorities, especially the detectives, were communicated with by Emile A. Billet, who, in partnership with Mrs. Louis J. Behm, conducts a grocery establishment at the corner of First and Dryades streets. Billet telephoned to the police headquarters that a safe which had, he alleges, carelessly been left open, was rifled of a sum aggregating \$500. The mysterious manner in which the sum had been stolen, and the very unsatisfactory way he went about explaining the matter to Detectives Stubbs and DeRance aroused their suspicions as to the real thief, and it was not very long before they became convinced of the fact that Billet was the one who had appropriated the \$500.

"Billet, in explaining the robbery to the detectives, said that Mrs. Behm, as was her custom, went to the market, and a short while subsequent to her return home the loss of the money was discovered. Billet alleges that he was under the impression that the safe was locked, and

felt assured of the safety of the money, and he impressed Mrs. Behm with the same idea. In notifying the police, Billet requested that an investigation of the matter be held, and the above named detectives lost no time in arriving on the scene of the alleged robbery. They were shown the safe wherefrom the \$500 was supposed to have been stolen. Upon an investigation of the premises and of the circumstances surrounding the robbery, the officers said that they were firmly convinced of Billet's guilt. In substantiating their allegation, they claim that it was next to an impossibility for any one to have stolen the money except whosoever may have had immediate access to the premises, such as Billet possessed. They did not hesitate to impress Billet with the idea that they believed him guilty. Accordingly they approached him, and, so the detectives allege, said that if he (Billet) did not replace the \$500 by eight o'clock, they would place him under arrest on the charge of theft. Of course, Billet made protestations in which he maintained his innocence, but it was of no avail. After speaking thus to Billet, the officers left the grocery, saying that they would return at the aforesaid hour.

"About 6:30, or 7 o'clock, Mrs. Behm, acting on Billet's suggestion, decided to make another investigation of the safe. She summoned her mother and Billet, and they opened the safe. Mrs. Behm, in her examination, pulled out one of the drawers of the safe, wherein it was the custom to keep whatever paper money she had in the house. Finding this empty, as far as the \$500 was concerned, she extracted the second and last drawer, little expecting to find the money there. Much to her astonishment and, apparently, to Billet's, the package of bills, which had been missing, was found. When this discovery was made, there remained about an hour of the time allowed Billet by the officers to 'find' or restore the money. The detectives maintain that they had made a thorough examination of the safe and of its contents. However, Billet alleges that they were mistaken and denies that they looked into the safe at all. It is said that Billet and Mrs. Behm are engaged to be married. The latter is at present suing her husband for a divorce, but, in the meanwhile, is living with Billet. He has had considerable experience in the grocery business and has been robbed on several occasions."

The defendant answered as follows:

"Now into court comes the Times-Democrat Publishing Company

and for answer to plaintiff's demand, admits that the words complained of were published in the newspaper as aforesaid. But denies that it was done maliciously, but are *bona fide* comments on matters that became, and were, matters of public notoriety, etc., discussion, and were published in the course of conducting a newspaper, and are therefore privileged." And there is a prayer for judgment.

The counsel in the case began the taking of testimony on behalf of the defendant out of court, but the counsel for plaintiff objected that such testimony was irrelevant, for the reason that the answer admitted the publication and claimed that it was privileged, without affirming the truth of the statements therein contained. And this objection was reserved to be passed on by the court. Some days later, and whilst the taking of testimony in its behalf was still going on, the defendant filed an amended answer, reiterating the defense originally set up, and containing the following additional averments, to-wit:

"Defendant avers that said publication was made in good faith, and upon reliance on the official public reports of the police authorities of the city of New Orleans, and was substantially true and correct as to all the facts stated; that, in making the said publication, the defendant was carrying out its purpose of publishing legitimate news, upholding morality, and that it was not actuated by any other purpose."

Objections to testimony offered in support of these averments were also referred to the court, and they, together with the objections previously mentioned, were overruled, and there was judgment for the defendant.

The facts disclosed by the record are as follows, to-wit:

The plaintiff and Mrs. Behm are the proprietors of a grocery on the corner of First and Dryades streets in this city, which is conducted, mainly, in the name of Mrs. Behm, though the parties are equally interested,—the purchases for the business being made indifferently in the name of either, and the financial management being, practically, under the exclusive control of the plaintiff. In a room, occupied as a sleeping apartment, immediately adjoining the store, there was an iron safe, in which, at the time of the occurrence out of which this suit arose, there were six or seven hundred dollars in money, together with some books and papers and a few articles of value other than money. Inside of the safe, there were four compartments, or pigeon-holes, one above the other. In the upper compartment, or pigeon-hole, was an iron

drawer, secured by a lock. In the next compartment, below, which measured, approximately, $3\frac{1}{2} \times 5\frac{1}{2}$ inches in height and width by about six, or eight, inches in depth from front to rear, was a wooden drawer, without a lock, and below the compartment containing the wooden drawer were two other compartments of the same size; so that, the wooden drawer would as readily fit in the one as in the other. In the wooden drawer, upon the occasion in question, there were thirty-five or forty dollars in nickels. In the compartment next below, there was a roll of bills amounting to \$500, and consisting of two or three one hundred dollar bills, and the rest in bills of the denominations of \$20, \$10, and \$5. And in the lowest compartment, there was a bag of silver coin. On Sunday morning, February 11, 1900, the plaintiff arose early and opened the store, but, shortly afterwards, wishing to get change for a two-dollar bill, he went to the safe for that purpose. The morning was dark and rainy and the safe was unfavorably situated with respect even to the little light that penetrated the room; he, therefore, held a lamp in one hand while he adjusted the combination and opened the safe door with the other. When he had opened the door, he placed the lamp on the safe, took out the drawer containing the nickels and put it on the bed, and after taking from it the change that he needed, replaced the drawer, as he supposed, in the compartment from which he had taken it, closed the door of the safe and returned into the store. As a matter of fact, however, he had, by reason of the obscurity, mistaken the compartment and had put the drawer into the one which contained the \$500 in bills, so that, when the drawer was pushed in and the door of the safe closed, some of the bills were shoved back and occupied the space between the rear end of the drawer and the rear end of the compartment and some of them were pressed down underneath the drawer. Later in the morning, about eight o'clock, it being then lighter, the plaintiff had occasion to go again to the safe, and, upon opening it, he missed the roll of paper money, and the fact that he had made the mistake as described not suggesting itself to his mind, he concluded that he had been robbed, which conclusion he at once communicated to Mrs. Behm, asking her, at the same time, whether she had taken the money. Upon her replying in the negative, he, immediately, telephoned to the police department and, after he had waited several hours and made several efforts in that direction, two detectives, Stubbs and DeRance, appeared upon the scene. Those officers inquired

who had the combination of the safe and who had access to the premises, and, probably, made other pertinent inquiries; and the safe was opened and exhibited to them; but, whilst the wooden drawer was pulled partly out, so that they could see its contents, it did not occur to any one to take it entirely out of the compartment and look behind or underneath it. Officer Stubbs, in view of the fact that the plaintiff alone knew the combination by which the safe could be unlocked, and of such other information as he obtained, reached the conclusion that the money was in the possession of the plaintiff, and he so stated to Mrs. Behm. Officer DeRance does not seem to have shared that opinion, and it is not pretended that the plaintiff, who is shown to be very deaf, heard the statement made by Stubbs, though both officers testify that it was communicated to him by Mrs. Behm. Upon the other hand, Mrs. Behm testifies that she did not, for a moment, consider the statement as having been seriously made, and that the idea seemed to her preposterous, since most of the missing money belonged to the plaintiff, who could, without objection from her, at any time, have disposed of the whole of it. The officer who made the statement referred to testifies that before leaving he said to Billet, "You put that money back, because I am coming back here again. I will be back here again to-night or to-morrow morning." The other officer testifies that his companion said to Mrs. Behm, "We will be back in a day or two, or something likke that, and we want the money placed back. No witness intimates that anything was said about the officers returning at eight o'clock that night or that any threat was made that Billet would be placed under arrest on the charge of theft. Upon the whole, we are satisfied that the plaintiff was not made aware that either of the officers had seriously charged him with having taken the money, and he could not have been aware that he was threatened with arrest, since no such threat was made. During the day, probably, just after the departure of the detectives, the plaintiff and Mrs. Behm were interviewed by the corporal of police who was in command of the precinct in which their store was situated, and he reported to his captain, who, in turn, handed in the following written report to the superintendent of police, to-wit:

"SIXTH PRECINCT—DEPARTMENT OF POLICE.

"City of New Orleans, Feby. 11, 1900.

"To the Superintendent of Police—

"Sir:—On the 11th day of February, 1900, at 12:30 M., Corporal Perez reported the following:

"Name and place of party suffering loss—Mrs. Louis J. Behm, Dryades, cor. First st.

"When and how loss occurred—Enter, day time, and grand larceny.

"Where it occurred—Dryades, cor First st.

"List, description and value of each article stolen—Cash money, U. S. currency, \$500."

"Corporal Perez reports between 7:30 and 8 A. M., this date, some unknown person entered the bedroom of Mrs. Lizzie J. Behm, in the rear of her grocery, corner of Dryades and First streets, while she was absent at market, and stole from an iron safe, which had been left unlocked, \$500 of United States currency of the denominations of \$5, \$10, and \$20 bills. There was, also, \$20 in silver money and two diamond rings, valued at \$100, in the safe, which were not stolen. The corporal interviewed Mr. Emile J. Billet, the manager for Mrs. Behm, who, with Bertha Dennis, the colored cook, were the only ones in the house at the time of the robbery, and he says he saw the money when he was last at the safe, at seven this A. M., and missed the money when he went there again at 11 A. M. The colored servant saw no strange person about the place and could form no idea as to how the robbery occurred."

On the night of the same day, about half-past ten o'clock, after the store had been closed, Mrs. Behm and her mother made a search of the entire room containing the safe, and, being unsuccessful, Mrs. Behm finally suggested to Billet that they should once more examine the safe, and take everything out, and she thus describes their proceedings: "I sat on the bed while he pulled things out, books, papers, receipts and other valuable things that were in the safe. Now we had pulled it all out except this drawer, and I said to him, pull the drawer out too, and give it to me, here. And, as he pulled the drawer out, I saw some bills, lying flat down, and I ran my hand there, and there was the roll of money, crammed behind the drawer, some at the bottom, some at the back, like you would jam something in a hole."

The discovery thus made was communicated to the police officers on the beat early the next morning, and they informed Mrs. Behm that they would convey the information to headquarters, and, during the day, the following report appears to have been made by the detectives, who did not, however, again visit the store, to-wit:

"DEPARTMENT OF POLICE, CITY OF NEW ORLEANS.

"Detective Office, New Orleans, La., Feby. 12, 1900.

"Detectives on case—Stubbs and DeRance.

"Case No.—921.

"Residence—Dryades and First sts.

"Location of offense—Dryades and First sts.

"Date committed—Feb. 11 between 7 and 8 A. M.

"Character of offense—Grand larceny. \$500.

"Date reported—Feb. 11.

"Parties arrested— _____

"DETAILED REPORT.

"We investigated said case and was satisfied in our own minds that there was no robbery committed by any outsider, and made it known to Billet. The money was placed back in the safe and found by Mrs. L. J. Behm, who lives in the house with Billet."

Upon the morning of the day upon which this report was made, there had appeared in the Times-Democrat, an article, referring to the subject under consideration, entitled "A Strange Robbery," concerning which and concerning the further action taken, the, then, city editor of the defendant's paper testifies as follows, to-wit: "Inasmuch as the facts contained in the article are purported to be based on the official police report, and inasmuch as the tenor of the article led me to believe that there was something else in the story, I proposed to look into the matter further." He also states that a member of the local staff of the paper told him, during the day, that Detective Stubbs had told him, the reporter, "of some man who had robbed himself—I think that was the way he put it"; that he telephoned to another reporter to see the detective, but that the other reporter was too busy, and that he then instructed still another attaché of the paper, who had done some "space work," to investigate the case, and write it up, giving the parties in interest the benefit of their own statements; but that, before publishing the article, which was written up under the instructions so given, being the article here complained of, he had a conversation with Detective Stubbs, through the telephone, in which that officer confirmed what he had heard from his reporter and told him that there was no possible chance that the money was in the safe upon the occasion of his visit to the defendant's store, and also told him something about the relations existing between the plaintiff and Mrs. Behm, and about a divorce, or

pending suit for divorce, between Mrs. Behm and her husband. The space writer by whom the offending article was prepared interviewed the plaintiff and Mrs. Behm on the morning after the discovery of the money, and was shown the safe, and given a full explanation of the whole matter. He had access to the reports which by that time had been handed in at headquarters, but does not appear to have consulted them, or even to have interviewed the officers by whom they were made. It is not suggested that the defendant has ever offered any reparation to the plaintiff, but, as we have seen, even now, affirms that the publication complained of was "substantially true and correct."

OPINION.

The original answer rested the defense solely on the ground that the publication was privileged, and the evidence should have been confined to the question of privilege *vel non*, save in so far as it may have been admissible in mitigation of damages.

The supplemental answer affirms the truth of the statement published, and thus presents an additional defense, and introduces a new issue. But the defense thus presented is not inconsistent with the original defense, and there is no *change* of issue in the sense of substituting one issue for another. Under the circumstances, and as the amendment was offered before the case was put on trial, we are not prepared to say that it was improperly allowed. C. P. 420.

The justification set up in the supplemental answer has not, however, been sustained by the evidence.

"In giving currency to libellous or slanderous reports and publications a party is as much responsible, civilly and criminally, as if he had originated the defamation." *Staub vs. VanBenthuyssen*, 36th Ann. 467. "Tale bearers are as bad as tale makers." *Harris vs. Minvielle*, 48th Ann. 908.

In undertaking, therefore, to justify, by proving the truth of the facts stated, the defendant not only assumed the burden of proving that the detectives made the statement attributed to them, but of proving that those statements were true. And it has not met the requirements of the case in either respect. It has not been proved that the plaintiff was the real thief, or that he took or, intentionally, concealed the money which was supposed to have been stolen. On the contrary, it is shown, conclusively, that, before the publication of the article in

which that language was applied to him, an explanation had been made, which should have satisfied any reasonable mind, that the money had not been stolen or intentionally concealed by any one, and which made it plain that if the plaintiff had taken it and had appropriated it to his own use he would have been guilty of no crime. It has not been proved that the detectives were convinced that the plaintiff had appropriated the money, for one of them, DeRancé, testifies that he was not of that opinion. It has not been proved that the detectives impressed the plaintiff with the idea that they believed him guilty, since the evidence shows that that suggestion was only made by Stubbs to Mrs. Behm, who did not take it seriously, and hence did not communicate it, as a serious charge, if at all, to the plaintiff. It is not pretended by any witness that the detectives, on leaving the house, notified the plaintiff that they would return at eight o'clock and would place him under arrest on the charge of theft unless the money was replaced in the meanwhile. And it is shown that the money was not found in the last remaining hour of the delay thus said to have been allowed and as the result of a search suggested by the plaintiff, but that it was found some hours later, during a search suggested by Mrs. Behm.

The only question, then, is, whether the publication, as true, of the injurious statements in question, is protected by any privilege? We know of no law to that effect. There would have been no privilege, whether absolute or conditional, even if the defendant had confined itself to the publication of the reports as made by the corporal of police and the detectives, and as entered upon the books kept by the superintendent of police or the chief of detectives for that purpose, since neither common convenience nor the interests of society require that the opinions, suspicions and deductions of police and detective officers, whether reported in writing to their superior officers, or through the telephone to the newspapers, should be published to the world. Such reports are in no sense judicial proceedings, and their publication is entitled to no greater privilege than that of reports emanating from private individuals. Where a proceeding, in the nature of a criminal prosecution, or in a civil suit, has actually been filed, in a properly constituted tribunal, and there has been a judicial hearing of some kind, the publication, without malice, of a fair and accurate report of what has taken place before such tribunal is privileged, though whether the privilege attaches where the proceedings are merely preliminary and

ex parte is not so well settled. An author of recognized authority says, upon the latter point: "The right to publish reports of *ex parte* proceedings and preliminary examinations, and the like, does not seem to be fully conceded by the law. The weight of authority is in favor of extending the privilege to report of arrests, on information gained from papers on file, so long as such reports do not assume the guilt of the accused person and are not otherwise defamatory."

Newell on Defamation, Slander and Libel, p. 549.

So, it has been held that a newspaper may report the fact that a person has been arrested and held for examination on a particular charge, but that it has no right to go beyond this and assume the guilt of the person charged. *Tresca vs. Maddox*, 11 Ann. 206; *Usher vs. Severance*, 20 Me. 9.

Upon the other hand, it has been held that the publication of a statement made by a justice of what had been said by persons applying to him for a warrant, which statement, not appearing in any affidavit, was made as part of a hearing, was not privileged.

McDermott vs. Evening Journal Association, 43 N. J. 488.

That reports made to police officers charging persons with crime are not judicial proceedings, the publication of which is privileged. *Jastremski vs. Marx Nansen*, 120 Mich. 677; *McAllister vs. Detroit Free Press*, 76 Mich. 343. And that entries in books kept by detectives are not judicial proceedings, and no privilege protects their publication. *Fullerton vs. Berthraume*, 6 Quebec Sup. Ct. 342.

"It is well settled that, in the absence of statute, newspapers, as such, have no peculiar privilege, but are liable for what they publish in the same manner as the rest of the community, and this, whether the publication is in the form of an item of news, an advertisement, or correspondence." *Am. & Eng. Ency. of Law* (2nd Ed.), Vol. 18, p. 1051. *Fitzpatrick vs. Publishing Company, Limited*, 48th Ann. 1116.

No special damages have been proved, nor was it necessary that they should have been. "Damages, or injury, may be inferred from the nature of the words written, and from the circumstances under which they were written, without specific proof." *Warner vs. Clark & Co.*, 45 Ann. 863.

In *Tresca vs. Maddox*, 11 Ann. 206, the court found that the publication of the libel was followed, upon the next day, by a recantation, and that the reputation of the plaintiff was vindicated by articles writ-

City vs. Kee.

ten by the employé by whom the libel had been penned and subsequently published in the same paper. Nevertheless, it was said, "The injury had been done *Vox semel missa non revertit*. The slander circulated by one issue of the paper could not be wholly obliterated by recantation in another."

In the case at bar, there has been no recantation nor reparation of any kind. On the contrary, the defendant has affirmed the truth of the libel complained of by averments in its pleadings which it has failed to sustain by proof.

For the reasons thus assigned, it is ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that there now be judgment in favor of the plaintiff, E. A. Billet, and against the defendant, The Times-Democrat Publishing Company, in the sum of five hundred dollars, with legal interest thereon from judicial demand, and costs in both courts.

Rehearing refused.

BREAUX, J., believing the amount allowed should be at most nominal, dissents in this case.

No. 13,663.

CITY OF NEW ORLEANS VS. SAM KEE.

SYLLABUS.

The ordinance adopted was a health ordinance. To maintain it an inspection of laundries was necessary. The reasonable fee imposed to pay the inspector for his services was properly charged to the defendant. The inspection was made for the benefit of the business itself, as well as in behalf of the public health. From the point of view sustained by the facts that it was compensation for services rendered, the ordinance is not unconstitutional on any of the grounds urged by defendant.

A PPEAL, from the First Recorder's Court for the City of New Orleans—*Hughes, J.*

Joseph E. Generelly, for Plaintiff, Appellee.

Rufus I. Paddock and *Edward Barnett*, for Defendant, Appellant.

The opinion of the court was delivered by

BREAUX, J. Appellant complains of a fine imposed by the Recorder of the First Recorder's Court for his having violated that section of the ordinance of the city, numbered 15,709, C. S., which reads, "that the said board shall collect from all owners and managers of laundries or public wash-houses a reasonable fee sufficient to cover the cost of such inspection, charging for each and every inspection the sum of twenty-five cents."

Appellant is the owner of a public laundry and was its owner at the date an inspection was made in accordance with the ordinance in question. He refuses to pay the inspector's fee of twenty-five cents.

The defense was that the fine was illegally imposed under the ordinance, for the reason that it is unconstitutional and that it is the taking of property without due process of law.

We, in the first place, are called upon to determine whether the ordinance is a health ordinance. We think it is. The expressed purpose of the ordinance cited *supra* is to maintain cleanliness and to compel laundrymen to use only clean water for washing clothes and to prevent the employment of persons who have diseases that are contagious and to prohibit them from washing the clothes of persons inflicted with any contagious or infectious disease.

The objection is not so much directed against the inspection, for we take it that no one will seriously contend that the city has no authority to inspect a business in the cleanliness of which so many are directly interested, as it is against the fee of inspection. The control and regulation of the laundry business have generally been held to be vested in municipal corporations.

But as to the fee. This objection falls in the presence of the fact that it is a compensation for services rendered and that it is in no respect an imposition for the sake of revenue. The authority to impose a reasonable inspection fee for an equivalent arising from the inspection was recognized by this court. The claim for the fee was rejected because plaintiff sought to recover the fee as a source of revenue. *Mayor vs. Mary Lewis*, 32 Ann. 1233.

In other jurisdictions courts have sustained claims for inspection fees imposed for the benefit of the business itself as well as of the community. To quote: "When quarantine regulations provide for the disinfection of goods or of a vessel which has probably been exposed to

contagion, the services rendered may be regarded as for the benefit of such goods or vessel, because from such services they are relieved from the suspicion of being dangerous, and are exonerated from further detention and purification, and the charge for the services so performed may be imposed on the owner of the property or a lien may be created upon such property for the amount of such charges." *Harrison vs. Mayor*, 1 Gill. 264; *Ferrari vs. Board of Health*, 24 Fla. 390; *Morgan's S. S. Co. vs. Louisiana Board of Health*, 118 U. S. 455.

Again, in another jurisdiction: "Inspection fees are not taken, but are imposed under the principle that they are compensation for services rendered in and about making such inspection, which is presumably beneficial to the person upon whom the fees are imposed under and by virtue of the general police power of the State," citing a number of decisions. *Chicago N. & V. Coal Co. vs. Peoples*, 54 N. E., p. 961.

From the point of view of equivalent received there can, in our view, arise no reasonable objection to a small inspection fee imposed to pay the inspector.

A similar question was before us recently for decision. We can see no good reason to arrive at a different conclusion from that expressed in the decision to which we refer. *City of New Orleans vs. Hop Lee*, 104 La. 601.

Something was said *arguendo* about discrimination and that this small amount would fall unequally upon the small and the large laundries. We have not found the discriminative effect charged in the enforcement of the ordinance. Besides, the only objection raised here is that of the constitutionality of the ordinance.

We have not found it unconstitutional, and it therefore remains for us to affirm the judgment.

The law and the evidence being in favor of plaintiff the judgment is affirmed.

No. 14,397.

STATE EX REL. J. HOUSTON THOMAS VS. HON. L. E. HALL, JUDGE, ET ALS.

SYLLABUS.

1. The case did not, as made to appear on the merits, come within the supervisory jurisdiction of this court to the extent of rendering it necessary to set aside the sentence and judgment. The affidavit or information under which

State ex rel. Thomas vs. Judge. -

defendant was prosecuted informed him of the nature of the accusation to enable him to properly defend himself against the charge brought.

2. The statute was substantially complied with, also the ordinance of the corporation the defendant was charged with having violated.
3. The defendant was not taken by surprise and the judgment will be *res judicata*.

A PPLICATION for writ of *Certiorari* to the District Court for the Parish of Ouachita.

Allan Sholars, for Relator.

 Respondent Judges *pro se*.

 The opinion of the court was delivered by

BREAUX, J. Relator invokes the jurisdiction of this court under Article 94 of the Constitution to have the record reviewed and to that end to have the papers and documents sent here in the case of the City of Monroe vs. J. H. Thomas.

Briefly, the complaint of the relator is that he was charged by affidavit before the City Court of the city of Monroe with (on the 27th day of January, 1902) drawing, displaying, presenting, or exhibiting a dangerous weapon, to-wit, a pistol, with intent to intimidate, contrary to the ordinance of the city of Monroe. Defendant appealed to the District Court of Ouachita Parish. Before this court he filed a motion to quash and dismiss the charge. This motion was overruled and, after trial, the judgment of the City Court condemning the accused, was affirmed.

The ground urged by relator is that the information filed against him does not set forth an accusation of an offense committed, or violation of any statute or ordinance; that from its very nature any violation of the ordinance referred to, is an offense against the person, and that there is no violation of the ordinance charged unless there be charged an intent or attempt to intimidate some person in particular.

In the second place relator's contention is that the court erred to his prejudice in weighing the testimony.

By Act 138 of 1888, the Legislature created the office of City Court and provided for the prosecutions in criminal cases before the court on affidavit "stating briefly the nature and cause of the accusation." In that connection relator points to the fact that Article 90 of the Consti-

tution ordains that in all criminal prosecutions the accused "shall be informed of the nature and cause of the charge against him."

The judge of the District Court, in compliance with the rule nisi, which was issued by this court, in his return to the rule, says that by the affidavit to which we have heretofore referred, the relator was sufficiently charged in the City Court with a violation of Sec. 74 of Ordinance 838 of the city of Monroe, which provides that whoever shall draw, display, present, or exhibit with intention of committing any crime or to intimidate any person, any pistol, bowie knife, gun, or other dangerous weapon within the corporate limits shall, on conviction, be fined, as stated in the ordinance; that it appears that relator pleaded not guilty in the City Court and was regularly tried without having urged any objection by plea or otherwise as to the sufficiency of the charge, and the motion to quash or dismiss was filed only on appeal to the District Court; that relator does not complain that the proceedings in the District Court were irregularly conducted or that the judge acted beyond the jurisdictional powers of the court, but contends that he erred in his rulings regarding the sufficiency of the affidavit or charge and in regard to the force and effect of the evidence adduced on the trial.

The error complained of under the circumstances, we take it, informed the defendant sufficiently of the nature and cause of the action to which he was called to respond.

A decision of recent date epitomizes the rulings of this court as relates to violations of municipal ordinances: *State vs. Baker*, 49th Ann. 76. If open to objections they are not prejudicial to the extent of requiring the exercise of supervisory jurisdiction. *State ex rel. Satcho vs. Judge*, 49th Ann. 235. We do not think that we would be justified in holding differently in this case from that which we decided upon this point in the case just cited.

It remains that the City Court is invested with power to inquire into and pronounce upon the violations of the city ordinances of the nature of that alleged in the case before us. The objection here raised to the proceedings has been reviewed on appeal and the result of the inquiry was against relator. In the light of the decisions of this court to which we have referred the proceedings are not null. It will be borne in mind that the case is not before us on appeal, and that our jurisdiction is more restricted under the Article 94 of the Constitution than it is on appeal.

This brings us to the second contention of relator, viz., that the court erred in its judgment regarding the weight of the testimony, that the preponderance of the evidence sustained his innocence of the charge. Under this writ the judgment will not be reviewed or disturbed, even if it has been rendered without sufficient evidence. *Hagstett vs. Justice*, 47th Ann. 1533.

We have found no good ground in the ordinance of the city cited *supra*, in the act of the Legislature No. 138 of 1898, in the Article No. 111 of the Constitution granting the right of appeal, or in the article (No. 10) ordaining that one should be informed of the nature and cause of the accusation, that we thought would justify us in holding that a defendant is not as much bound by his plea to the affidavit or information in the City Court under this special statute as he would be bound by a similar plea were he called to answer to an information or indictment in the District Court. This being our view of the questions presented, it follows that we can grant to the relator no relief.

For reasons assigned our rule *nisi* is recalled and discharged and relator's demand is dismissed.

No. 14,127.

EDWARD A. VIGUERIE VS. G. L. HALL ET ALS.

107	767
109	337
107	767
110	160

SYLLABUS.

A suit brought by the seized debtor, or his assignee, against the purchaser at a judicial sale to annul the sale, is not a petitory action, though plaintiff prays, as a consequence of a judgment in his favor, that he be decreed to be the owner of the property and placed in possession. There is no necessity for the petition in such a suit to specifically describe the property purchased, when allegations as to the suit and the sale fix, unmistakably, its identity. There is no necessity for such an assignment to be by authentic act, nor as against the purchaser at the sale to have been recorded. In a suit brought upon an assignment of a right of action evidenced by a writing in which the assignment is declared to have been made for "value received," defendant cannot urge, upon an exception of no cause of action, that the instrument should have specifically set forth what the actual consideration was, and set forth all the details of the transaction. It is *prima facie* valid. Defendant is without legal interest to inquire into the precise character of the transfer, unless he can allege and show injury. All he can exact is full defense and protection.

A PPEAL from the Nineteenth Judicial District, Parish of Iberia—
Cammack, Judge ad hoc.

D. Caffery & Son and J. Sully Martel, for Plaintiff, Appellant.

Voorhies & Voorhies, Fenner, Henderson & Fenner, and Clegg & Quintero, for Defendants, Appellees.

The opinion of the court was delivered by NICHOLLS, C. J.

STATEMENT OF THE CASE.

The plaintiff having appealed from an exception of no right and no cause of action, it is necessary for a proper understanding of the case that the petition which was filed should be transcribed in full:

"The plaintiff alleged that on the 11th of June, 1896, an order of seizure and sale was signed in the suit of Sealey vs. Hall, No. 2734 on the docket of the Nineteenth Judicial District Court of Iberia, under which the sheriff seized and sold certain property which he described, belonging to Mrs. F. C. Viguerie."

"That said property was duly advertised to be sold at the courthouse in the Parish of Iberia on the 25th day of July, 1896, it appearing by the advertisement that the whole of the property would be sold as a unit under said writ. That the aforesaid property was fully equipped as a sugar plantation with sugar house, machinery and apparatus for refining sugar, all of modern make and of good quality, and also with a large growing crop of cane, corn and other plantation products, and a certain number of mules and plantation implements, all constituting together with the land, buildings and refinery, a complete sugar plantation, worth, with all its contents, not less than one hundred and fifty thousand dollars."

"That after the issuance of said writ and prior to the date of the aforesaid sale certain creditors claiming privileges on the sugar house and the acre of ground on which it stood, and upon the crop then growing upon said plantation, filed *ex parte* oppositions or interventions in the said executory proceedings, in which they asked for a separate appraisalment of the sugar house and acre of land, and of the crop, and it was thereupon ordered, *ex parte*, that a separate appraisalment of said

property be made, and that the sheriff hold the *pro rata* proceedings from the sale thereof in his hands until the claims were adjudicated."

"That notwithstanding the orders for the sale of the whole of said property as a unit, and the advertisement in conformity with said order, and the subsequent orders for a separate appraisement, as aforesaid, the said property was dismembered and offered for sale in parcels, the naked land being first offered for sale, and adjudicated for the sum of forty thousand five hundred dollars to G. L. Hall, Mrs. Lillie W. Weeks, wife of G. L. Hall, and Miss Harriet Weeks, residents of the Parish of Iberia, in the proportion of one undivided half to G. L. Hall, and an undivided quarter to each of the other purchasers; after which the sugar house and the acre of land upon which it stood, and all fixtures, appliances and appurtenances therein contained, were offered separately and adjudicated to the same parties, in the same undivided proportions, for the sum of seven hundred dollars; and, thirdly, all the crops of cane, corn and other plantation products growing upon said property were offered and sold separately to the same parties for the sum of four hundred and sixty-nine 70-100 dollars; and, finally, the mules and implements attached to said plantation and forming part thereof were sold separately and adjudicated to the same above named parties."

"That Mrs. F. C. Viguerie, the defendant in execution, filed on the day of sale and placed in the hands of the sheriff, by whom the same was read aloud before the bidding began, a written protest against the dismemberment of her property and the offering of same for sale as thus dismembered, to which no attention was paid; the sheriff proceeded with the sale of the property, as above recited, and in addition a verbal protest was made in her behalf."

"That at the opening of the sale, a bid of fifty thousand dollars was offered for the whole property, the bidder being prepared to bid a much larger sum, which bid was rejected by the sheriff, who proceeded to the sale of the property in parcels, and adjudicated same as above recited."

"That the sale of the aforementioned property in parcels, as recited, was not only contrary to law, but was not authorized by any order of court. That such sale inflicted irreparable loss, as no competition was allowed, no bid entertained, and no bid could possibly be entertained, for the whole of the property under the unauthorized and illegal proceeding of the sheriff, the sugar house and the crop having no value to any other bidders than those who had bought the land."

"That the sale as made was virtually preceded by no advertisement, no sale of the whole property as advertised having been made, and that no bids were given on said property when it was offered piecemeal, except the bids of the aforesaid adjudicatees."

"That the purchasers of the property were the immediate vendors of the defendant in execution, and they well knew that the offering and selling of the aforesaid property in parcels was in violation of the stipulations of the act of sale and mortgage."

"That said property which sale is inscribed in book X, folio 298, had been bought not long previously by Mrs. Viguerie for one hundred thousand dollars, and had by her been improved by the expenditure of about thirty-five thousand dollars, in the sugar house, which was sold for seven hundred dollars; and, that after the adjudicatees at said sheriff's sale went into possession of said property they sold one hundred acres thereof, with the right to mine all salt on said island to the Myles Salt Company, Limited, a corporation organized under the laws of the State of Louisiana, and domiciled in the Parish of Iberia, Louisiana, of which F. F. Myles is president, for the sum of three hundred thousand dollars, of which land the said company is now in possession."

"That said company does not possess in good faith, having bought with full notice of the nullities recited above, all of which appear on the face of the papers relating to said sale."

"That the proceedings related above amounted to actual spoliation, and that the adjudicatees are likewise possessors in bad faith, and that they with the said Myles Salt Company, Limited, owe rents, profits and revenues from the dates of their respective possessions; that the adjudicatees owe in the proportion in which they bought, as stated above, rents, profits and revenues from the date of adjudication, and that the third possessor owes rents, profits and revenues from the day of its purchase of the aforesaid property, which was on the 10th day of May, eighteen hundred and ninety-eight."

"That the rents, profits and revenues due by the original adjudicatees amount to ten thousand dollars per annum, and by the third possessor to thirty thousand dollars per annum, from the date of its purchase. Petitioner is the transferee and subrogee for a valuable consideration of all the rights and rights of action possessed and held by the defendant in execution, Mrs. T. C. Viguerie, on the day of the sale and since, and appears in this proceeding in his own behalf."

"That prior to the institution of this suit, he offered to pay to the adjudicatees the price paid by them to the sheriff under the sale as herein attacked as illegal, and made a formal tender thereof to them, and demanded that the property acquired by them be retransferred to him in consideration of the said offer and of the said tender, but they refused, all in the presence of witnesses."

The Myles Salt Company excepted that the plaintiff's petition disclosed no cause of action and no right of action in favor of the plaintiff, either against it or the other defendant.

G. L. Hall, Mrs. G. L. Hall and Miss Harriet Weeks excepted to plaintiff's petition on the ground of vagueness, for this:

"That plaintiff, Edward A. Viguerie, who claims the ownership of the property mentioned and described in his petition, and who demands to be placed in possession thereof, does not set forth with that certainty required by law, the nature, origin and description of his titles to said land, so as to apprise your appearers of the material facts and circumstances of his alleged ownership, and which are necessary to put them on their just defense, and to bar any subsequent investigation of the matters set forth in his pleadings, when they shall have been once decided."

"That he does not state in his petition who has suffered irreparable loss by the adjudication of that property, by the sheriff, whether it be himself personally, or some one else. Nor does he give the name of the person who made the alleged bid of \$50,000.00. Nor does he state whether that unknown person then and there protested against the adjudication of that property to appearers. Nor does he take the proper steps in due time to protect his alleged rights under said bid, all of which are facts material and necessary to be set forth with certainty in the pleadings to put appearers on their just defense."

"That he does not state what stipulations of the act of sale and mortgage on which were based the executory proceedings were violated by the offering and sale of the seized property, nor in what manner those stipulations were violated."

"Appearers allege that all these facts are material, and must be set forth explicitly to notify them of the nature and extent of plaintiff's demand and pretensions of ownership, as well as the facts on which he relies to support and maintain his action, in order to permit appearers to prepare and file their proper defense."

"Therefore, appearing solely for the purposes of this exception, they

pray that it be maintained and that plaintiff's action be dismissed with costs, and for all relief."

They next prayed for *oyer* of plaintiff's muniment of title, as set forth in his petition, and that on failure to produce the same the suit be dismissed.

On June 21st, 1901, the exceptions of no cause of action and no right of action and the plea of vagueness were referred to the merits, and the prayer for *oyer* was granted and plaintiff ordered to comply with said prayer within ten days, otherwise the suit would be dismissed.

On June 28th, 1901, the plaintiff in obedience to the order of court filed the document on which he had declared. On July 11th, G. L. Hall, Mrs. G. L. Hall and Miss Harriet Weeks filed an exception of no right and no cause of action, and for that purpose averred that the document filed by the plaintiff in obedience to the order of the court to produce his muniment of title, is not a document which gives title to the land claimed, because, first, it is not a sale, as there is no mention of a price nor is it a document evidencing the sale of any specific piece of property, and much less that of Weeks' Island, or Grand Cote plantation, as it contains the description of no land whatever, neither by boundary nor by number of acres.

Nor is it a document of any value in law, inasmuch as it purports to be a private act which is not evidenced by any witness, and which has never been recorded and is still unrecorded in the Parish of Iberia, and which has never been acknowledged before any officer of the law authorized to receive such acknowledgment.

Because said document purports to be merely a transfer of a right or cause of action to set aside, rescind and annul a judicial sale, an incorporeal right, which cannot by any means be construed as a sale of landed property on which to ground a petitory action, as is done in this case.

Because said document not evidencing a sale, inasmuch as it contains no specifications of a price, cannot even be looked upon as an intended gift or donation, being an absolute nullity, not being made conformably to law and vesting in plaintiff no interest whatever in this matter.

Plaintiff being therefore without interest, and having no muniment of title, is also without right to contest the adjudication made to movers and exceptors, as set forth by him in his pleadings.

Exceptors and appearers further plead that plaintiff's petition discloses no cause of action, because:

1st. He does not allege injury to himself.

2nd. Because there is not in his pleadings any offer on the part of plaintiff to warrant that the property adjudicated to appearers by the sheriff by the judicial sale which he assails, if resold, would bring a higher price than it did at the first sale.

They therefore pray that their exceptions be maintained, and that plaintiff's action be dismissed with costs.

On trial, the exceptions of no right and no cause of action were sustained and the suit dismissed, and plaintiff appealed.

OPINION.

NICHOLLS, C. J. Defendant's first contention is that the action brought by the plaintiff is a petitory action; that such an action can only be brought by one having title to the property he seeks to revendicate; that the instrument upon which the plaintiff declares is not a sale vesting title to the property in the possession of the adjudicatees at a judicial sale.

That it evidenced no "sale," as no price in money is fixed as the consideration of the transfer; that it is not the sale of an immovable, as the act contains no specific description of any property, either by metes, bounds or areas.

Plaintiff's action is not a petitory action; he does not claim that he had at the time of the institution of the suit ownership of the property, and that the defendants were in possession of it without title; on the contrary, his action admits that they presently hold title, but he urges that the judicial sale under which they claim is defective and should be set aside. The action is one to annul a judicial sale of property of which Mrs. Viguerie was confessedly the owner at the time of the execution sale and then holding and owning it under title from the present vendees. The title which defendants conveyed to the plaintiff's assignor is not questioned; the contention is that it was good and valid and that Mrs. Viguerie has not been legally divested of it.

It may be that the judgment in this suit may shift the present ownership of the property out of the defendants into the plaintiff, but that will only be by way of consequence and result. Plaintiff's prayer to be decreed the owner of the property and placed in possession is based upon the assumption that he will succeed in having the sale set aside.

We think that the object sought to be obtained and the subject-matter of the suit are clearly and specifically set out. Defendants are certainly advised as to the property which they purchased at sheriff's sale on the day stated in the matter of the suit of Sealey vs. Hall, No. 2784 of the docket of the District Court for Iberia Parish, and of the property which they themselves had previously sold to Mrs. Viguerie, and it is the judicial sale of that property which is sought to be avoided besides. "*Id certum est quod certum reddi potest.*" There may be occasions where it is necessary for the ascertainment of the rights of parties that the exact legal character of a particular instrument should be fixed, but we are not able, *up to the present time*, to see what difference it makes to the defendant whether the document on which plaintiff declares is technically a "sale" or not.

The exact situation in this respect can be made to appear on the trial of the cause, should it be shown to be a matter of any importance.

In *Helluin vs. Minor*, 12 Ann. 124, in which defendant defended a petitory action, basing his defense upon an assignment to him of a patent to public land, in which it was declared simply that the assignment was made "for value received," the court said:

"The plaintiffs contend that if the act referred to be considered a sale, it is void for want of a fixed and determinable price; if it be considered a donation, the assignment is void, not having been passed before a notary public and two witnesses. There cannot be any doubt that our courts would consider the instrument invalid as a donation, and it may not be (technically considered) a sale under the Civil Code, but it does not necessarily follow that the contract itself, after its execution, is to be considered as void because it cannot be classed under the contract of sale. (*Troplong Vente* No. 148.) A contract is not invalid because the cause has not been properly expressed. (*Civil Code*, No. 1894.)"

In *Kirk vs. Kansas City R. R. Co.*, 51 Ann. 675, the court said:

"If there be a valid existing cause for a contract, it is immaterial that it should not fall under some contract particularly named or classified in the Code. (*C. C.* 1777.)" See on this same subject *Walker vs. Fort*, 3 La. 536; *Jackson vs. Miller*, 32 Ann. 432; *Bonner vs. Beard*, 43 Ann. 1038.

Defendants' next contentions are that the document is of no value so far as third persons are concerned, because it is signed only by the

parties to it, is witnessed by no one and has never been recorded. (C. C. 2266-2442); that it is not valid, even as the sale of a litigious right, because it makes no mention of a price (C. C. 2652); that it is an absolute nullity as a donation *inter vivos*, if intended as such (C. C. 1326).

We are aware of no law by which a transfer, such as the instrument declared on evidences on its face, should be made by authentic act, and we know of no reason why it should, as against defendants, have been recorded. The defendants do not claim to hold the right which is declared to have been transferred by the instrument, nor to have claims in respect to it as creditors, which have been affected by non-registry. The character and effect of the transfer will have to be determined hereafter. As matters stand simply on an exception of no cause of action, we must assume it to be a legal act. Defendants have as yet shown no equities in the premises, and there is nothing to indicate that a single right or defense which they had or have against Mrs. Viguerie could not be as effectually set up against the present plaintiff as against her. Defendants have no legal interest in inquiring into the relations between the plaintiff and his transferor, or the motives or purposes which may have influenced them in passing the act, further than in seeing that she is not legally injured thereby. The same defenses which would have been available to defendants as against a demand made by Mrs. Viguerie, to annul the judicial sale, appear to be open to them as against the plaintiff. They can ask no more. It is no unusual occurrence for parties to place their property and rights in the name and under the control of others, without any consideration whatever and without the intention of ownership being actually transferred.

Such acts are permissible and cannot be gainsaid, unless they carry injury to some one. A *simulation* is not necessarily a fraud; it is only so when injury to third persons is intended. (Gravier vs. Carrably, 17 La. 118.)

Our court has held that simulated transfers may be for a lawful purpose, as, for instance, to enable the transferee to bring suit; to raise money, etc., etc. (See 6 Ann. 710; 10 Ann. 570; 12 Ann. 622.) Parties opposing such acts must allege and show wherein they are aggrieved thereby. (Hennen, 180.)

This doctrine finds expression in repeated adjudications of this court in matters of bills and notes under a syllabus to the effect that the "holder of negotiable paper endorsed in blank may sue, though only

agent, in his own name, or he may sue as holding the legal title for the use of the real owner. Defendant has no right to enquire whether plaintiff in whom the legal title appears to be vested, be an agent or the real owner, unless by a fictitious assignment it be attempted to deprive him of substantial grounds of defense, which he may have against the true owner. The judgment will be *res judicata* against any one who might thereafter claim an interest in the note or bill." (Noble vs. Flower, 35 Ann. 740.)

Defendants urge that the right or cause of action to rescind, annul and set aside an adjudication at a judicial sale is essentially personal to the party divested of his title by that sale, and cannot be transferred to a third person having no interest in the result of the proceedings that have culminated in that sale. No one but the party thus divested, or perhaps his creditors, can exercise that right, because it is only the party who has been injured by that sale who can demand its nullity and rescission. They cite 6 Ann. 581 to 585; 12 Ann. 271; 29 Ann. 212.

The decisions referred to by defendants were all rendered after hearing upon the merits. The principles announced therein may possibly be important hereafter, but they do not find application in the present situation of affairs. The doctrine therein announced is that "judicial sales ought not to be annulled, unless at the instance of a party who has a right to sue for their rescission and who can show an injury resulting to him from the sale, and without a previous offer of indemnity to the *bona fide* parties whose interests are to be affected by the judgment."

In the case at bar the action is not brought by a person claiming adversely as a creditor, but by one asserting the rights of the party who was the owner of the property at the time of the sale, and standing in her shoes as her assignee. Plaintiff's rights are derivative through transfer and subrogation from that owner herself. It is her rights which are herein sought to be enforced through the plaintiff. She, as the owner divested of ownership through the judicial sale, had certainly a legal interest to attack it for good and sufficient reasons alleged and to be shown. Plaintiff's allegations certainly show great injury to Mrs. Viguerie if they can be sustained by proof. One of the difficulties in the way of our sustaining the judgment appealed from is that we are in the dark as to the exact situation of these various parties before and at the time of the judicial sale, *inter se* and *quoad* the property. These are all back of plaintiff's petition and back of defendants' exception of

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no cause of action. It will require further pleadings and evidence to develop the situation so that we can deal with it advisedly. We are restricted now to one single exception, which has to be determined on the face of the papers and with plaintiff's allegations taken for true.

From that standpoint we cannot affirm the judgment appealed from. The District Court should have overruled the exceptions and permitted the action to proceed according to law.

For the reasons assigned, it is ordered, adjudged and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided and reversed. It is further ordered and decreed that the exceptions of no cause of action and of no right of action be overruled without prejudice; that the cause be remanded to the District Court for the Parish of Iberia, reinstated on its docket, and further proceeded with according to law.

BREAUX, J., takes no part.

MONROE, J., dissents.

Rehearing refused.

No. 14,135.

STATE EX REL. JAMES J. WOULFE VS. JOHN ST. PAUL, JUDGE DIVISION
"C," ACTING, ETC., ET ALS.

107	777
109	801
109	803
109	807
109	813

SYLLABUS.

1. Act 30 of 1877 prohibiting municipal corporations from incurring in any one year expenditures in excess of the revenues of the year, and requiring the revenues of each year to be devoted to the expenses of the year, and prohibiting municipal corporations from issuing evidences of indebtedness, precludes the city of New Orleans from entering into a contract by which the cost of paving a street is to be paid for out of the revenues of future years, and is to be settled for in the meantime by the issuance of interest bearing certificates.
2. It makes no difference that the payments are to be made out of that part of these future revenues required by law to be reserved for public improvements; by being so reserved these revenues do not cease to be part of the revenues of the years in which they are collected, and as such required to be devoted to the expenses of those years.
3. The case of Railroad Company vs. Police Jury of Bienville, 48th Ann. 331, distinguished.

APPPLICATION for writs of *Mandamus*, *Certiorari* and Prohibition.

State ex rel. Woulfe vs. Judge.

Edward Rightor, for Relator.

Respondent Judge *pro se*.

Samuel L. Gilmore, City Attorney, for the City of New Orleans,
Respondent.

McCloskey & Benedict, for Louisiana Improvement Company, Re-
spondent.

The opinion of the court was delivered by PROVOSTY, J.

Mr. Justice BREAUX and Mr. Justice BLANCHARD dissent, each hand-
ing down a separate opinion.

APPLICATION FOR MANDAMUS.

PROVOSTY, J. Our supervisory powers are invoked to compel the respondent judge to grant an injunction restraining the City of New Orleans from entering into a certain contract with the Louisiana Improvement Company for paving with asphalt certain parts of Canal street, the principal street of the city.

Of the numerous grounds of injunction set forth in his petition the relator presses upon our attention only two.

The first of these is that two-thirds of the work called for by the contract in question is to be met by means of an illegal assessment imposed upon the property abutting upon the parts of street to be paved, and that the relator as owner of some of the property so abutting has an interest in resisting the assessment: said assessment being illegal for the reason that there exists a contract between the city and the Rosetta Gravel Company by which the said company is obligated to pave with gravel and keep in good order for ten years, and at the end of ten years to deliver, in good order, the same parts of street now about to be again contracted for, and that the said contract and also the assessment imposed under it having two more years to run, the work of putting the said parts of street in good condition and of keeping them so should be done by means of the enforcement of the said contract, and not by means of a new contract and an additional assessment.

This ground is not borne out by the facts. The evidence shows that the Rosetta Gravel Company has gone into the hands of a receiver, and that its contract is not enforceable; also that the city has made a *bona fide* but fruitless effort to put the parts of street in question in proper condition at her own expense, and that the present measure for putting the said parts of street in proper condition is wise and necessary. Evidently there is not here a case of abuse of power.

There is no force in the contention that the city should pay for this work out of her general treasury. The taxes levied from the whole city are for the use of the whole city, and the discretion of the city authorities cannot be controlled by the courts in the matter of determining upon what particular streets the avails of those taxes shall be bestowed. In all probability the city could not expend this large amount on the particular parts of street in question without detriment to other streets having equal claims upon the fund out of which the amount would be abstracted.

The other ground of injunction is that the city's portion of the cost of the work, under the contract, is proposed to be paid for in a manner prohibited by law.

The work is to be done in 1901, and it is proposed to pay the city's portion of the cost of it out of the revenues of the years 1902, 1903 and 1904; and furthermore it is proposed to issue certificates of completion of work, which certificates are to bear six per cent. *per annum* interest.

Act 30 of 1877 provides, as follows:

"Sec. 1. That no Police Jury of any parish, nor any municipal corporation in this State, shall make any appropriation of money for any year, which appropriation, separately or together with any other appropriation or appropriations of the same year, shall be in excess of the actual revenues of said parish or municipal corporation for that year.

"Sec. 2. That no Police Jury of any parish, nor any municipal corporation in this State, shall approve any claim, or make any expenditure, which shall, separately or together with other claims approved or expenditures made, be in excess of the actual revenues of that year.

"Sec. 3. That the revenues of the several parish and municipal corporations of this State, of each year, shall be devoted to the expenditures of that year; provided that any surplus of said revenues may be applied to the payment of the indebtedness of former years.

"Sec. 5. That no (evidence of indebtedness) or warrant for the payment of money shall, after the first day of October, eighteen hundred and seventy-seven, be issued by any parish or municipal corporation in this State, except against money actually in the treasury of said parish or municipal corporation. Any person violating the provisions of this section shall, on conviction, be punished by imprisonment, or fine, or both, at the discretion of the court; provided, that this section shall not apply to the certificates issued to jurors and witnesses for their services in the court."

Section 2 of this act provides that no municipal corporation shall make any expenditure in excess of the revenues of the year in which the expenditure is made. This contract proposes to make an expenditure in excess of the revenues of the year. Section 3 provides that the revenues of municipal corporations of each year shall be devoted to the expenditures of the year. This contract proposes to devote part of the revenues of 1902, 1903 and 1904 to an expenditure of the year 1901. Section 5 provides that no evidence of indebtedness shall be issued by any municipal corporation. This contract proposes to pay for the work by issuing so-called certificates of payment to bear six *per cent. per annum* interest. The contract, therefore, is proposed to be entered into right in the teeth of three of the express prohibitions of the act.

It is argued that because these certificates are not warrants, and because they are payable out of a portion of the revenues of the years 1902, 1903 and 1904, required by law to be reserved for improvements, therefore the certificates and the expenditure are not obnoxious to this law. But this law prohibits the issuance not alone of warrants, but also of evidences of indebtedness, and these certificates are most unquestionably evidences of indebtedness; they are issued for the very and express purpose of serving as such, and would not be issued at all if not to be useful as such; and this reserved portion of the revenues of 1902, 1903 and 1904 does not by the fact of being reserved for public improvements cease to be part of the revenues of those years.

Paving Co. vs. City, 43 Ann. 464.

So stringent and sweeping did the framers of this law consider it to be that they thought that under its provisions it would not be possible to pay an expenditure of a previous year even out of a surplus; and that it would not be possible to issue even certificates to jurors and

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witnesses; and so thinking they put special *provisos* in the act to permit the doing of these things. But by this contract it is proposed to devote to an expenditure of a previous year, not a surplus, but revenues reserved for the expenses of the year in which they are reserved; and it is proposed to issue not mere certificates, but interest-bearing certificates. To permit this would be not to interpret this law, but to nullify it.

The case of Railroad Company vs. Police Jury of Bienville, 48 Ann. 331, is distinguishable from the present one by the fact that there the expenditure involved was one as to which the Police Jury had no discretion, an expenditure incurred under a mandatory statute requiring the Police Jury to provide a courthouse, Section 2746 Rev. Stat.; whereas here the expenditure, while useful and judicious, is entirely discretionary. The court may have been justified in holding in that case that the expenditure in question came within the spirit if not within the express letter of the *proviso* permitting certificates to be issued to witnesses and jurors, a courthouse being about as indispensable for the administration of justice as are witnesses and jurors; but the court would be wholly and plainly unjustified in exempting from the statute an expenditure such as the one in the present case, coming squarely within both the letter and the spirit of the prohibition of the statute. The spending of revenues in advance, as is proposed to be done by this contract, was the very evil aimed at by the statute.

It is, therefore, ordered, adjudged and decreed, that the *mandamus* prayed for herein be made peremptory at the cost of the respondent. Rehearing refused.

No. 14,435.

STATE EX REL. J. B. EDWARDS VS. HON. J. B. LEE, JUDGE.

SYLLABUS.

1. There was a disagreement between relator's counsel and respondent regarding the date of the court's adjournment which led counsel, in good faith, to arrive at a conclusion different, the trial judge says, from that which he intended.

State ex rel. Edwards vs. Judge.

2. The junior counsel was in court when the defendant was sentenced. He had previously informed the judge that he understood that no appeal would be taken. No bill of exceptions was presented or motion for new trial made.
3. The court, after adjournment, had no authority to grant an order of appeal in a criminal case, which, under the statute, must be applied for and entered in open court prior to adjournment.

A PPLICATION for Writs of *Mandamus* and *Habeas Corpus*.

Charles C. Egan, for Relator.

Respondent Judge *pro se*.

The opinion of the court was delivered by

BREAUX, J. Plaintiff asks that a writ of *mandamus* be made peremptory directing the district judge to sign bills of exceptions attached to his petition for a *mandamus* and that when the *mandamus* shall have been made peremptory and the appeal ordered that a writ of *habeas corpus* issue directing the warden of the State penitentiary to return relator to the parish jail at Leesville, Vernon parish.

Relator was tried under an indictment for murder. The jury returned a verdict of manslaughter and recommended the accused to the mercy of the court on April 11th, 1902. He was sentenced on the sixteenth of that month to a term of seven years at hard labor in the penitentiary. He was taken by the sheriff from the parish jail in Vernon parish on the seventeenth day of April, 1902, and conveyed to the State penitentiary.

Relator avers that the leading counsel in the case asked the presiding judge when court would adjourn and that in answer he said that he expected court would adjourn on Friday, the eighteenth of April; that previous to this conversation he had mentioned to the judge the matter of taking an appeal in this case and had said to the judge that he intended to appeal; that this counsel was detained in Shreveport, but wired to the judge that he would return on Thursday, acting under the belief that prisoners would not be sentenced until Friday; that when he returned he found that relator had been sentenced and was on his way to the penitentiary; that the court had been adjourned.

He further avers that his counsel called on the judge and found him willing to do anything possible in order not to deprive relator of his right of appeal, but that the judge could not find authority for then

signing bills of exceptions and granting the appeal.

There were three counsel in the case, one, the senior, was in Shreveport, the other had returned to his home, and the junior counsel was the only one present when the defendant was sentenced. Relator alleges that there was a misunderstanding between court and counsel, which resulted in his losing his right of appeal unless the remedy here applied for is granted.

The judge of the District Court, in his answer to the rule *nisi*, says that five days after the defendant had been convicted, he pronounced sentence. He further says, that counsel who urges the application for a *mandamus* came to him a short while after defendant had been convicted and said he thought he would appeal the case; that he was asked by this counsel how long court would be in session; that his (the judge's) reply was that he was waiting for the report of the Grand Jury then in session and that court would adjourn immediately after the end of their labors; that he could not say when they would make their final report and that it might be as late as Friday.

He, counsel, then remarked that he was going to Shreveport and if anything came up not to assign it to be heard before his return, to which the judge replied "all right." That counsel made no mention of an appeal; that no bill of exceptions had been presented to him and no motion for a new trial, although a number of days had elapsed from the day of defendant's conviction to the day he was sentenced; that he could know of the intention of counsel only by his acts in open court; that he had been informed by the junior counsel, Mr. Huson, that there had been a consultation held and that no appeal would be taken, as will appear by his affidavit made part of the return to the rule *nisi*; that the Grand Jury made their final return on Wednesday; that he then notified the sheriff to bring convicted defendant into court and he imposed sentence on relator in open court in the presence of his attorney, Huson.

We can only regret that this misunderstanding arose between counsel and the court. We understand in the course of a friendly conversation counsel concluded, from the utterances of the judge, that the court would not adjourn before his return, while, on the other hand, the judge did not think that he had said anything to justify that inference.

Counsel, with fairness which does him credit, says in his petition

that he does not wish to reflect on the district judge and that the result came about purely from a misunderstanding between court and counsel.

As regrettable as the disagreement is, we are constrained to the conclusion that the court has been regularly adjourned. Even if there had been some haste to adjourn, we would not see our way clear to decide that the case should be reinstated and an appeal granted. It will be borne in mind that relator has not made the least showing in due form of the acts prejudicial to his cause during the trial. But we are informed by the court that there was no undue haste; that all matters requiring attention during the term had been disposed of and that nothing remained to be done.

"The statement of the judge is usually accepted when a difference arises between him and defendant's counsel with regard to the facts." State vs. Melton, 37 Ann. 77; State vs. Beck, 41 Ann. 584.

In our view of the law and of the judge's authority we are led to the conclusion that the adjournment was legal and regular and that in view of the statement in the return (the defendant not having objected through the counsel by whom he was assisted when sentenced), he can no longer be heard to urge the complaint here urged.

The judge is concluded by the order of adjournment and could not rescind it. The term had been brought to a final close. The power of the court came to an end by its final adjournment. It loses its control over cases decided unless its jurisdiction is kept alive by motion or other proceeding to that end.

In our view of the law, no alternative is left to us except to recall the rule *nisi*.

It is ordered, adjudged and decreed, that the rule *nisi* which was issued in this case be recalled; the application is denied and the suit dismissed.

No. 14,423.

STATE EX REL. JOSEPH D. TAYLOR VS. JUDGES OF THE COURT OF APPEAL,
PARISH OF ORLEANS, ET ALS.

SYLLABUS.

When by *remittitur* entered before judgment in the lower court the amount in dispute is reduced to below the jurisdiction of the appellate court, the latter court has not jurisdiction.

City of Shreveport vs. Belt Railway Co.

APPPLICATION for Writs of *Mandamus*, Prohibition and *Certiorari*.

James B. Rosser, Jr., for Relator.

Respondent Judges *pro se*.

Joseph Brewer, for Miss Ida Ober, Respondent.

The opinion of the court was delivered by

PROVOSTY, J. Miss Ida Ober brought suit in the Civil District Court of the Parish of Orleans against relator for \$104.16, and before judgment entered a remittitur for \$20.83, leaving \$83.33 as the amount of her demand. Judgment was rendered in her favor for this amount and from this judgment the relator took an appeal to the Court of Appeal of the Parish of Orleans, the lowest limit of whose jurisdiction in appeals from the Civil District Court is \$100.00. On exception that court dismissed the appeal, and this is an application to compel it to entertain jurisdiction. How can it do so when the lower limit of its jurisdiction in such cases is \$100.00, and the suit involves only \$83.00?

The application must be denied and dismissed, and it is so ordered. Rehearing refused.

No. 14,408.

CITY OF SHREVEPORT VS. SHREVEPORT BELT RAILWAY COMPANY.

SYLLABUS.

1. The difference between plaintiff and defendant grows out of the measurement of defendant's "road-bed" in order to fix proportion of cost of paving due by defendant to plaintiff.
2. The statute looks only to the "road-bed" in fixing the amount. Plaintiff's contention is that this "road-bed" is seven feet wide, the defendant's that it is less. When ties are used, the rail rests on the inside and outside of the track the length of the ties. When girders or sleepers are used, the width of the "road-bed" is less. The "road-bed" consists of the foundation on which the superstructure rests. The rails are the superstructure and rest on the girders.

8. The proportion of the space being limited to the "road-bed," the court holds that it is without authority to take the outside of the track into account on the ground that the road is benefited by the adjacent pavement. "Road-bed" owes the proportion of cost of paving. This does not include part of the adjacent roadway on which rails do not rest.

A PPEAL from the First Judicial District, Parish of Caddo—
Land, J.

Edward Hughes Randolph, City Attorney, for Plaintiff, Appellant.

Wise & Herndon, for Defendant, Appellee.

The opinion of the court was delivered by

BREAUX, J. Plaintiff brought this suit to recover the proportion of cost of paving streets in Shreveport in which the defendant Railway Company has its tracks.

The amount claimed by plaintiff is arrived at by taking seven feet as the width of construction for which it claims the defendant is liable, while on the other hand defendant's insistence is that it owes the cost of construction on the basis of a road-bed five feet and five-eighths inches in width.

Heretofore wooden cross-ties were used in the construction of road-beds. They measured seven feet in width and this heretofore has been taken as the width of the road-bed itself and the cost of construction was fixed on that measurement.

This court has decided with reference to measurement for paving purposes, when cross-ties are used by the defendant company, that the road-bed must be taken as measuring seven feet in width; "that the cross-ties extend to a width of seven feet, it follows that the road-bed is seven feet wide." *City of Shreveport vs. Railroad Co.*, 104 La. 276.

Of late years, in several cities, a change has been made and a new method of laying road-beds adopted. The defendant road adopted the new plan and used stringers or girders to support its rails. On defendant's theory, the superstructure of railroads is supported on this plan by a foundation less wide than under the old plan of construction.

Plaintiff's able counsel, in endeavoring to meet this theory, says that there has been no change in the width of the tracks and that they occupy superficially as many as seven feet of the track.

Tracing plaintiff's power of assessment in matter here to the statute number 10 of 1896, it is plainly evident that where a railway bed and track occupy a portion of the street it shall pay in proportion to the space occupied by its "road-bed." Section 2 of the statute. This has been interpreted by this court as extending to a width of seven feet, because that was the length of the ties taken as constituting the width of the bed.

Here there are no ties and it appears that the same weight as when ties were used is supported by a road-bed less wide. The gauge has remained the same, but the road-bed has been curtailed of its proportion. This road-bed alone is to be taken as the width in fixing defendant's proportion of costs. "The road-bed is the foundation." Elliot, Vol. 1, p. 5, San Francisco and Northern Pacific vs. State Board, 60 Cal. 34.

The word "road-bed," as relates to railroads, is the bed or foundation on which the superstructures of the railroad rest. Such is the definition given by both Worcester and Webster, and we think it correct. San Francisco vs. C. P. R. R. Co., 63 Cal.

"The rails in place constitute the superstructure resting upon the road-bed." R. R. vs. State Board, 60 California, p. 34.

The track is not supported and buttressed by the paved street on each side of the road-bed to such an extent as would warrant us in adhering to the first measurement, *i. e.*, of seven feet, because of benefit derived thereby. If the benefits be as great as contended for by plaintiff, they are not included within the road-bed. The law fixes the width, *i. e.*, it specifically limits it to the road-bed. It is not left to us to fix it by reference to the benefit which may be received by other physical agencies not included in, or forming part of, the road-bed.

The extent of the adjacent support is lacking in certainty. Should we take the space of six inches on each side as the measure representing this support, the question would no longer be within the limit laid down in the statute, *viz*: the width of the road-bed, and should we consider this six inch strip we would be justified in construing the statute as including the whole space on each side of the road-bed, that is from curb to curb. This would be trenching upon legislative functions specially prohibited.

But plaintiff earnestly invokes the rule laid down in our own decision cited *supra* as one of property which should remain un-

changed. True when the facts upon which the rule is founded are about the same, the rule of *stare decisis* should govern, but if the defendant were to construct a narrow gauge road on a four foot foundation or road-bed, under the statute, the road-bed would represent the width for assessment of defendant's costs and not the adjacent concrete which forms no part of the road-bed. The argument of the learned counsel that on unpaved streets the defendant still uses the old cross-tie plan of laying its road seven feet in width, and that this is demonstration enough that the benefit derived is at least equal to the number of feet to make it seven as contended by plaintiff would be unanswerable were it not for the limitation to "road-bed" upon which we have heretofore dwelt. The argument for plaintiff sets forth that there is already trouble about the superstructure of the track and in order to build and strengthen the concrete cubes it would disturb and weaken at least a foot of the street on the outside of each bed. There is testimony in support of the argument. We infer that the necessity of these changes or repairs is very remote, besides if it should arise in our view it would devolve upon the defendant to make the repairs at its costs.

Moreover, a question very similar was passed upon in the case before cited, from which we quote: "The idea in fixing upon a width of seven and three-quarters feet, being that the cross-ties are seven feet long and that in renewing them it would be necessary to disturb the pavement for several inches on either side, where it is shown that by cutting a defective tie in the middle it may be drawn from either end and hence that the excavation need not be wider than the length of the tie." (This is in substance one of defendant's answers to one of plaintiff's demands.) "Beyond which it is also shown that as the roads in question are built, it is not contemplated that the ties will ever be renewed." This is precisely the position of defendant now with reference to its girders, concrete, and rails; that it is not contemplated that they will require renewal.

The legislative will leaves no room for interpretation that would include anything outside of the line of the road-bed. It only remains for us to affirm the judgment.

For reasons assigned, it is affirmed.

BLANCHARD, J., recused on account of interest in the result.

No. 14,430.

STATE OF LOUISIANA VS. DENNIS WILLIAMS.

107 789
114 72.107 789
124 157

SYLLABUS.

1. While the character of defendant had not been put at issue, yet he had been a witness in his own behalf. Comments of the prosecuting officer are not cause to set aside the verdict even though they may not have been directly suggested by the testimony. The closing remarks were immaterial, or at least were not prejudicial.
2. The oversight of the district attorney in not signing the bill of indictment was not fatal to the indictment.
3. It is settled that an averment that the verdict is contrary to law and evidence brings up no ground for review.
4. The statement of the trial judge embodied in the bill of exceptions that there was a case pending in which the defendant attempted to bribe a witness is accepted as correct in the absence of testimony on the subject.

A PPEAL from the Fourth Judicial District, Parish of Union—
Dawkins, J.

Walter Guion, Attorney General, and *Fred. F. Preaus*, District Attorney (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Ward D. Munholland, for Defendant, Appellant.

The opinion of the court was delivered by

BREAUX, J. Attempting to bribe a witness was the crime with which Dennis Williams was charged, indicted, tried, found guilty, and sentenced to serve one year at hard labor in the State penitentiary.

The case is before us on bills of exceptions, motion for new trial, and motion in arrest.

Taking up, in the first place, bill of exceptions number one (1) it appears that defendant's counsel timely objected to the words of the District Attorney as follows: "I'll tell you, gentlemen of the jury, he is a bad man from bitter creek," used in speaking of the defendant in his closing argument.

Counsel notified the court that the District Attorney was speaking out of the record in using such language. Counsel for defendant sets forth in this bill of exceptions that defendant's character has not been

put at issue and that the District Attorney was not warranted in discussing his character; that the District Attorney was not stopped by the court, and no attempt was made to correct the effect that the statement had made upon the jury; that this officer proceeded with his argument, and discussing defendant's character said: "The defendant is bad after women," although the only evidence on this point was that one, a married man, whose name is given in the bill, was jealous of defendant on account of this party's wife.

Defendant, it seems, was a witness in his own behalf. Counsel recites in the bill of exceptions that in response to this question of the District Attorney: "You are bad after women, are you?" The defendant said: "I don't think I am."

That defendant's counsel a second time objected because the question, in view of the fact, was not one which the District Attorney had the right to propound in view of the issues. Defendant charges that this was error prejudicial to him in his defense.

The trial judge's narrative in the bill of exceptions shows that the defendant testified as a witness in his own behalf and on cross-examination the credibility of the witness was sought to be attacked inferentially by reference to the testimony which he had already given in his own behalf.

The first remark of the District Attorney, the District Judge, at the time, thought was made as an effort at humor. The court did not think that it had any undue influence on the jury or that it created any prejudice against the defendant. The jury was composed of intelligent men who were instructed by the court not to give any weight to counsel's statement not borne out by the evidence.

Three bills of indictment go far towards showing that he had no very serious cause of complaint when he was referred to as before mentioned. It is true that the attorney for the State should not seek to assail the character of an accused whose character is not at issue, but reason and authority, we think, warrant the court not to set aside the verdict unless it clearly appears that the jury was influenced by the language of the prosecuting officer (subject to criticism it may be), yet not affording ground sufficient to set aside the verdict. *State vs. Procella*, 105 La. 518; *State vs. Mack*, 45 Ann. 1155.

With reference to the second remark of the District Attorney made

in the course of his argument, objected to by defendant, the trial judge is equally as positive that it did not prejudice the cause of the accused. The remark was scarcely germane to the subject and should not, perhaps, have been made. We have conceived no reason to disagree with the District Judge in regard to its not having been detrimental to the defense. "Where such statements though of matters not in evidence, and hence improperly made, are immaterial, or, at least, not prejudicial, they will afford no ground for a new trial." Thompson on Trials, Vol. 2, p. 747.

In the next bill of exceptions in the order in which they were taken, numbered two, defendant, it appears, objected on the ground that the verdict is contrary to the law and the evidence. This ground it has long since been settled is not of itself reviewable on appeal.

The other ground set forth in the bill regarding the remarks of the District Attorney in his closing argument is only a repetition of the grounds heretofore decided in passing upon grounds urged in bill number one.

The next ground is equally untenable on appeal, that is, the alleged discovery of new evidence, in view of the fact that if the evidence is true as alleged, it goes to impeach the testimony of witnesses who have testified in the case.

In his motion in arrest of judgment, defendant alleged "that the District Attorney had not signed the bill of indictment, also that the indictment charges substantially that defendant did, on the 30th of November 1901, attempt to bribe a witness named———; that defendant shows that the foundation of the charge of attempting to bribe was set forth in the indictment to be in a case pending; that the burden of proof was upon the State and the State failed to prove the most material part of the charge; that a case was pending at the time that the offense was alleged to have been committed."

With reference to the District Attorney's oversight in not signing the indictment, we find a ready answer in the fact that the authorities have long since settled that this is not fatal to the indictment.

As relates to the fact asserted by defendant, as set forth in the bill of exception from which we have before quoted, we are informed by the statement of the trial judge, embodied in the bill, that the evidence shows that a criminal case was pending against defendant (in the

State vs. Carter.

court over which he presided) on the twenty-third day of November, 1901, and that on that day the defendant attempted to bribe the witness Lethro Jackson.

It appears from this statement that when the crime was shown to have taken place a criminal case was pending.

Our review of the different grounds has not resulted in our finding such error as would justify us in setting aside the verdict, sentence, and judgment of the court.

It is therefore ordered, adjudged, and decreed, for reasons assigned, that the verdict, sentence, and judgment, appealed from are affirmed.

No. 14,427.

STATE OF LOUISIANA VS. WILLIE CARTER.

SYLLABUS.

A dying declaration must go in as a whole, and is not rendered inadmissible because some of its statements of themselves and if standing alone would be inadmissible.

A PPEAL from the Twentieth Judicial District, Parish of Lafourche
—*Caillouet, J.*

Walter Guion, Attorney General, and *Whitnell P. Martin*, District Attorney (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

John S. Billiu, for Defendant, Appellant.

The opinion of the court was delivered by

PROVOSTY, J. The accused was convicted of murder and sentenced to be hung. No one has appeared for him in this court, and no brief has been filed in his behalf. The only thing we find in the record calling for our attention is a bill of exceptions reserved to the action of the trial court in admitting in evidence the dying declaration of

107	792
121	1076
107	792
124	206

the deceased. Certain statements contained in this dying declaration are pointed out as being inadmissible in evidence because not relating to the immediate circumstances of the killing, and on account of these objectionable statements the dying declaration is objected to as a whole.

This is the second time that this same dying declaration has been objected to on this same ground. On the previous occasion we disposed of the matter briefly, as follows:

"A written dying declaration is not inadmissible because sworn to; nor because some of its statements, of themselves and if standing alone, would not fall within the rule admitting dying declarations. The declaration must go in as a whole. State vs. Trivas, 32 Ann. 1086."

We see no reason for changing this ruling. The dying declaration is a peculiar species of evidence admitted, *ex necessitate*, in flagrant violation of all the ordinary rules of evidence. It violates the rule against hearsay; it has not the sanction of an oath; it cuts off the opportunity for cross-examination; it rides rough shod over the sacred constitutional right of an accused to be confronted with the witnesses against him. To all these grievous faults it may add the inherent infirmity of emanating from impaired faculties, benumbed already, or disordered by the panic of momentary death. All these objections are overborne by the one consideration of public policy, that society may not be deprived of the evidence such as it is, and whatever it may be worth. After all this, is the declaration to be excluded simply because the dying man has wandered off to some matters not pertaining to the immediate circumstances of the killing. Verily, if the law so decided, it would have strained at a knat after swallowing a camel.

Where a dying declaration, otherwise admissible, happens to contain some extraneous matter, there is presented a choice between three courses: First, of admitting it in its entirety, such as it is; second, of eliminating the objectionable parts; and, third, of excluding it. The first course would violate the rule by which dying declarations must be confined to the circumstances of the killing; the second would violate the rule by which dying declarations must go in as a whole; the third would deprive society of the benefit of the declaration, after for the sake of its admission sacrifice had been made of

such precious inheritances as the right of cross-examination and confrontation with witnesses.

Under these circumstances our ruling was that the declaration should go in, and we adhere to the ruling. Better let the declaration go in as a whole, such as it happens to be, with appropriate instructions from the court, rather than open the door to the dangerous process of revising or editing it, by which the sense of it might in particular cases be destroyed or distorted. The rule against fragmentary declarations has been established in the interest of the accused.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be affirmed.

Rehearing refused.

No. 14,409.

STATE OF LOUISIANA VS. POLITE SONIER.

SYLLABUS.

107 794
108 849

1. Act 44 of 1890, when reasonably interpreted, is not obnoxious to the objection that it denounces as a crime an act which might be consistent with innocence.
2. It is a rule of universal application that when a statute creates an offense and sets out the facts which constitute it the offense may be sufficiently charged in the language of the statute.
3. In order to justify the courts in holding a statute to be void, it must be alleged and proved that it is unconstitutional.

A PPEAL from the Fifteenth Judicial District, Parish of Calcasieu
—*Miller, J.*

Walter Guion, Attorney General, and *Joseph Moore*, District Attorney (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Daniel B. Gorham and Sompayrac & Toomer, for Defendant, Appellant.

The opinion of the court was delivered by

MONROE, J. The defendant appeals from a conviction and sentence under an indictment which charges that "he did, with a dangerous

State vs. Sonier.

weapon, to-wit, a knife, strike, thrust, cut and stab one Solomon Botley with intent, him, the said Solomon Botley, then and there, to kill and slay, contrary to the form of the statute of the State of Louisiana," etc. He relies upon a motion in arrest of judgment in which it is alleged that the indictment "describes no offence known to the law, or punishable under any of the statutes of the State of Louisiana. * * * That it is not charged that said act or intent were either wilful, felonious, or even unlawful; hence, no offense is charged."

The indictment was framed in conformity to section 1 of act 44 of 1898, which reads "That whoever shall shoot, stab, cut, strike, or thrust any person with a dangerous weapon, with intent to kill, shall be deemed guilty of a crime, and, on conviction thereof, shall suffer imprisonment, with or without hard labor, for not more than three years."

The learned counsel for the defendant say in their brief; that it was not charged that the intent was wilful, felonious, or even unlawful, and *non constat*, but that the accused might have acted in self-defense, or to prevent the perpetration of a felony.

In the case of *State vs. Bolden*, 107 La. 116 (31 S. R. 393), it was said of this argument, "It has been again and again answered"; and this court quoted with approval, the following language from the opinion of the Supreme Court of the United States in *U. S. vs. Kirby*, 7 Wallace, 482, to-wit: "The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law, which enacted that whosoever drew blood in the streets should be punished with the utmost severity, did not extend to a surgeon who opened the vein of a person who fell down in the street in a fit. The same common sense accepts the ruling cited by Plowden that the statute of I. Edw. 11, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, for he is not to be hanged because he would not stay to be burnt." And it was held that the statute under consideration, when reasonably interpreted, is not obnoxious to the objection urged. We adhere to the views thus expressed. Beyond this, it will be observed that the indictment in the instant case was framed in the language of the statute, and "while it is essential that all the facts constituting an offense must be so stated as to bring the defendant precisely within the law, it is a rule of universal application that,

SUPREME COURT OF LOUISIANA,

State vs. Miller.

when a statute creates an offense and sets out the facts which constitute it, the offense may be sufficiently charged in the language of the statute." Ency. of Pl. and Pr., Vol. 10, p. 483. In order, therefore, to justify us in holding the act now under consideration to be void, it would be necessary to allege and show that it is unconstitutional, which has not been done.

Judgment affirmed.

No. 14,406.

STATE OF LOUISIANA VS. GEORGE MILLER.

SYLLABUS.

1. The failure of defendant in a criminal case to introduce evidence in his own behalf which was within his control, for the reason that he did not believe it was called for, under the evidence which the State had adduced against him, furnishes no reason for a new trial.
2. In the District and not the Supreme Court is vested the right and power of determining whether a verdict rendered against defendant in a criminal case, was justified by the weight and sufficiency of the evidence adduced against him. When the District Court overrules a motion for a new trial, holding that the verdict was justified, the Supreme Court cannot review his conclusion, even though in a bill of exception reserved to this ruling, is embodied a *resume* of the testimony which was taken on the trial signed by the district attorney and counsel of the accused.

A PPEAL from the Criminal District Court, Parish of Orleans—
Baker, J.

Walter Guion, Attorney General, and *J. Ward Gurley*, District Attorney (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

Paul C. LaSalle, for Defendant, Appellant.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant appeals from a sentence for larceny, urging his grounds of complaint in a bill of exceptions taken to the

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refusal of the District Court to grant him a new trial. The grounds which he assigned as those entitling him to a new trial were:

1st.—Because the verdict was contrary to the law and the evidence.

2nd.—Because the evidence did not establish beyond all reasonable doubt the guilt of the defendant as the law required.

3rd.—Because the ownership of the property had not been proven as laid in the information, nor had there been any proof to show that the prosecuting witness was ever in possession of the property used as evidence and alleged to have been stolen by the defendant.

4th.—Because the State had failed to establish beyond all reasonable doubt the *corpus delicti*. That there was no proof to show that the property in question or any similar property had ever been taken and stolen by the defendant from the prosecuting witness.

5th.—Because the property in question and which was used in evidence on the trial is the property of the defendant. That the reason defendant had not established by proof his ownership of the property on trial was by reason of the fact of the want of proof on the part of the State to establish the *corpus delicti*, and that therefore defendant was not compelled under the law to make any defense thereto. That the property alleged to have been stolen by defendant was given and sold to defendant by Jack Kelly, a person whom defendant prays the court will cause to be summoned in court, so as to enable defendant to secure and have the benefit of his testimony, and to have the same made a part of the motion, as though written and embodied therein.

The court caused Kelly to be summoned and his testimony taken. The motion for a new trial was then taken up and argument heard. The court overruled the motion and the defendant appealed. Defendant annexed to his bill as part thereof his motion for a new trial and the evidence taken. In the bill it is stated that the judge overruled the motion for reasons orally assigned. What those reasons are we are not informed.

We find in the record a paper headed "Statement of Facts," which is signed by the district attorney and the counsel of the defendant. It purports to recite the testimony given on the trial by the different witnesses.

We have repeatedly decided that the Supreme Court is without jurisdiction in a criminal case to review the evidence which was submitted to the jury which went to show the guilt or innocence of the accused, in

order to ascertain whether the conclusions reached by the jury on the evidence before it was correct or not. This is true, whether this testimony be brought before us incorporated in a bill of exceptions taken by the ruling of the court refusing a new trial, or whether it comes up in the record as an agreed statement of facts signed by counsel of both parties. In the district judge is vested the right and power, after the jury has returned its verdict, to determine whether on the evidence which has been submitted to it, and upon which its verdict rested, a new trial should be granted or not. When his conclusions as to the guilt of the accused, under the evidence which was adduced on the trial, are in accord with those of the jury, and he refuses the new trial, we are powerless to review the ruling. If there was any legal complaint to be made of this evidence, whether because improper or illegal evidence was admitted, or proper and legal evidence was not allowed to be introduced, objections on that score should have been presented to us at the time in bills of exception then taken. If defendant conceived there was any legal reason why the jury could not or should not return a verdict of guilty on the evidence submitted to it, defendant should have stated his grounds to the court and called upon it so to charge as requested, he should have taken a bill. On the other hand, if the court itself should have given instructions to the jury of which defendant could legally complain, he should then have objected and reserved a bill.

The court allowed the testimony of Kelly to be taken in order to enable it, by taking that testimony in connection with that which had been adduced before the jury (of which it was itself legally advised) to grant a new trial if it thought it legally right that this should be done. Even with that additional evidence before him, taken in connection with that which had been adduced on trial, the judge was of the opinion that the State had made out its case and refused to reopen the case; appellant complains of his action. It is very clearly shown that while the testimony taken on the trial of the case was before the district judge himself, to be considered by him (coupled with the new evidence adduced), in order to determine him as to what his course should be, that evidence cannot be brought before this court for its consideration in the matter, and that the only evidence which could be before us would be that taken on the trial of the motion for a new trial, when embodied in a bill of exceptions taken to the ruling of the

State vs. Maxey et al.

judge on that motion as involving an error of law. Kelly's entire testimony was received below without objection, and no question of law arose from it or in the ruling of the District Court refusing a new trial. We certainly could not undertake to say on Kelly's testimony alone and without any knowledge legally of what the evidence taken on the trial had been, that the defendant was entitled to a new trial. We may say here, however, that a defendant who had failed to introduce certain testimony on his own behalf because he erroneously supposed it was not required by the necessities of his case, would not be entitled to a new trial in order to rectify his own error, unless under very extraordinary circumstances. Such a course would hold out a direct inducement to counsel of accused parties to commit errors. The judgment appealed from is affirmed.

No. 14,398.

STATE OF LOUISIANA VS. TOM MAXEY ET AL.

SYLLABUS.

1. The statement was not a mere narrative of the wounded man. Declarations of one wounded made immediately after the wounding as to how it was inflicted or by whom, have been held admissible where voluntarily or spontaneously made at a time so near the act as reasonably to preclude all idea of design.
2. One may by sign, he being unable to speak, given two minutes after the shooting to one to whom he runs and meets a short distance from the scene of the shooting, let it be known by whom he has been shot, and the declaration by sign is admissible as part of the *res gestae*.
3. The trial judge held that the accused should have sooner discovered the evidence upon which they based their motion for a new trial and that it was cumulative. New trial will not be ordered on appeal until it is manifest that error has been committed. There is no evidence showing that the trial judge has exceeded the bounds of the discretion with which he is vested.

A PPEAL from the Twelfth Judicial District, Parish of Sabine—
Lee, J.

Walter Guion, Attorney General, and *Amos L. Ponder*, District Attorney (*Lewis Guion*, of Counsel), for Plaintiff, Appellee.

William C. Pegues and *Charles C. Egan*, for Defendants, Appellants.

107	799
109	351
107	799
118	660

The opinion of the court was delivered by

BREAUX, J. The defendants, Maxey and Smith, were charged by information of the district attorney with shooting Barney Grogan with intent to murder. They were tried by jury and sentenced to three years' imprisonment in the State penitentiary. They appeal from the verdict and sentence. Their grounds are stated in three bills of exceptions.

The first bill of exceptions presents the question whether the evidence admitted was admissible as part of the *res gestae*. The defendants stoutly deny that the evidence was part of the *res gestae*. The court inserted in the bill of exceptions, in substance, that the witness, Bethany, who was lying in bed at the time and saw the shooting, testified that he immediately went out and met the wounded man, Grogan, while running from the saw-mill and calling for Manager G. W. Loring, and that he, the wounded man, told him, witness, that accused had shot him. It is in place to state that Grogan, the wounded man, was a night watchman of a saw-mill plant. This declaration of the wounded man was made as he was running from the scene of the shooting, and in about one or two minutes afterward he came to the residence of the manager, Loring, and by this time his tongue was so swollen he could not talk, and Loring asked him if Maxey shot him and he answered in the affirmative by nodding his head. The trial judge added that if the testimony of Loring were taken alone there would be some doubt as to its admissibility, but, taking the same in connection with the statement made to Bethany, the judge *a quo* believed it admissible as part of the *res gestae*.

There was oneness and identity between the utterance of the wounded man and the affirmative shake of his head, all within one or two minutes. That which he said to the witness whom he met while running is in substance the same as indicated by the affirmative nod of the head when asked by the manager if Maxey had shot him.

Mr. Bradner, in his work on Evidence, p. 490, says that it is not easy always to determine when declarations may be received as part of the *res gestae* and the cases are not always in harmony.

We understand the rule, sustained by many trustworthy decisions, admitting declarations, "made under the impulse of the occasion, though somewhat separated in time and place, if so woven into it by the circumstances as to receive credit from it." Abbott, Trial. Brief, p. 628.

Declarations connected by circumstances immediately following may be admissible. Bradner on Evidence, p. 494. "That is to say, a declaration to be a part of the *res gestae* need not be coincident in time with the main fact proved, if the two are so closely connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause." Bradner on Evidence, 2nd Ed., p. 494.

It was an impulsive declaration of the wounded man almost immediately afterward. Very little time elapsed between inflicting the wound and the declaration. One followed the other in rapid succession and left no time for connected narrative or self-serving account. Beyond question there are declarations after the act that are admissible. The ruling of the judge *a quo* finds support in *State vs. Thomas*, 30 Ann. 600, and in *State vs. Robinson*, 52 Ann. 541.

The defendants urge in matter of the foregoing bill of exceptions that Loring's evidence should have been excluded because it was not the spontaneous utterance of Grogan, the wounded man; that Loring suggested the names of the accused and asked: "Did Smith and Maxey shoot you?" and refer to one of the decisions of the court in which it was decided that the statement must spring from the act and under circumstances which exclude all idea of designs. *State vs. Thomas*, 30 Ann. 1134.

In our view, the question falls within the rule laid down in this case and the utterances to one witness and the sign given afterward to another were made and given under circumstances which preclude the idea of design and have every appearance of having sprung from the act. But it is said by defendants' counsel that Loring suggested the names of the accused. We have noted that the wounded man could not speak. The manager's inquiry must have been prompted by that fact. His inquiry was taken advantage of by the wounded man to account for his physical condition. He caught the meaning and replied. He availed himself of the words of the manager and made them his own. The truth of this affirmative sign is corroborated by the statement made immediately before to the witness Bethany. If Grogan could have talked, he would doubtless have said to Loring that which he had just said to Bethany.

The second exception reserved during the trial shows that, under the objection of the defendants, Bethany was permitted to testify that "he saw the man who shot Barney Grogan after the shooting coming

toward the house where he, Bethany, lived and asked Grogan who shot him," to which Grogan replied that Smith and Maxey "shot him"; that he "hailed him" ("them," we presume, is meant), and they would not answer, whereupon he fired at them and they returned the fire.

The objection was that it was hearsay and that it was self-serving.

Having decided that the testimony of Loring had been properly admitted, this virtually decides that the testimony of declarations made to Bethany a few moments before were also admissible and disposes of this bill of exceptions.

We are brought to bill of exceptions number three, reserved to the overruling of the motion for a new trial. The motion was sustained by the affidavit of the parties by whom defendant stated he would prove, in case of a new trial, that Grogan said that he did not know who shot him.

The following is the statement of the judge *a quo*, made part of the bill of exceptions, "that the alleged newly discovered evidence is cumulative and strictly rebuttal; that both of the witnesses relied upon lived in the town of Many in call of the courthouse and the case had been pending for some time and that it did appear that this evidence could have been obtained by the use of ordinary diligence. There must be an end of all things. The court is of the opinion that the accused were correctly convicted by an impartial jury and therefore refused a new trial."

About six months elapsed from the time the information was filed to the date of the trial. As to whether or not the defendants expected a different result on the second trial is not stated in their affidavit for a new trial. The asserted newly discovered evidence directly contradicts the evidence against the accused. It can have no other effect than to contradict the testimony admitted.

It is well settled by repeated decisions that a verdict will not be set aside and a new trial granted to enable the defendant to impeach the testimony admitted on the trial and, besides, motions for a new trial are largely left to the discretion of the trial judge. *State vs. Venables*, 40 Ann. 215; *State vs. Spooner*, 41 Ann. 780; *State vs. Young*, 34 Ann. 346; *State vs. Fahey*, 35 Ann. 9; *State vs. Dukir*, 35 Ann. 46; *State vs. Burt*, 41 Ann. 787; *State vs. Garig*, 43 Ann. 365; *State vs. Ware*, 43 Ann. 400; *State vs. Chambers*, 43 Ann. 1108.

The refusal to grant a new trial because the trial judge does not

believe the affidavit of defendant, is not open to review in the Supreme Court. State vs. Hunt, 4 Ann. 438; State vs. Rolland, 14 Ann. 40; State vs. Beaird, 35 Ann. 104. This was subsequently modified in State vs. Hyland, 36 Ann. 87, not to the extent, however, of holding that the trial judge is not vested with discretion to finally determine the question. It is subject to review on appeal only in case of manifest error. We have not found manifest error. Here it was not shown or alleged that the newly discovered evidence would change the result on new trial. Underwood Criminal Evidence, Section 519.

It is ordered, adjudged, and decreed that the verdict and sentence be affirmed.

Rehearing refused.

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ACCESSION—

It is held that the doctrine of reappearance of land after submergence is the one that controls the case, and that the principles governing the acquisition of land by accretion, or dereliction, are not directly determinative of the controversy, though having a bearing upon the same. If, after submergence, the water disappears from the land, either by gradual retirement, or by the elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation, extent, quantity, or boundary lines, the proprietorship returns to the original owner.

Hughes vs. Heirs of Birney, 664.

APPEAL—

Where judgment has been rendered in the District Court in a suit for separation from bed and board, from which no appeal has been taken, a separate appeal will not lie to the Supreme Court from the decree of the District Court which taxes costs simply by reason of the character of that suit. *Freie vs. Lubben, his wife*, 79.

An appeal is perfected by the filing of the appeal bond. From an order appointing or refusing to appoint a receiver under Act 159 of 1898, the appeal must be perfected before the expiration of ten days from the entering of such order appointing or refusing to appoint a receiver. *Crichton vs. Webb Press Co., Ltd.*, 86.

In case of doubt, the doubt will resolve itself in favor of the appeal. The sufficiency and competency of the surety was a proper subject for inquiry in the District Court. The return of appeals in matter relating to the appointment of receivers, under Statute 1898, is governed by special provision of that statute. The lack of an affidavit to show interest of the appellant affords no ground to dismiss the appeal where the interest is admitted by all the parties to the appeal. *Davies et als. vs. Water and Light Co.*, 145.

Where, in an action for partition by licitation among heirs, it appears that the property which is the subject of the partition is valued at more than \$2,000, and the only matter in dispute

APPEAL—*Continued.*

is as to the obligation of one of the heirs to collate a sum less than \$2,000, and he appeals from a judgment ordering him to collate, the appeal is properly taken to this court, and will not be dismissed, since the jurisdiction is determined, under Article 85 of the Constitution, by the amount of the "*fund to be distributed, whatever may be the amount therein claimed.*"

Succession of Magi, 208.

An appeal will not be dismissed because of the absence from the transcript of evidence which could not, if present, influence the decision of this court. The fact that counsel representing a number of appellants describe themselves, at one place in the motion, and in signing the bond of appeal, as "attorneys for plaintiffs" is not sufficient reason for dismissing the appeal for uncertainty as to the party appealing, when it otherwise appears, in such motion and bond, that it was the purpose to appeal for all the parties cast. As to the bond, it would have been good, if it had been signed by none of the appellants.

Bendich et als. vs. Scobel et als., 242.

An appeal bond, executed for the amount fixed by the court, is good for a devolutive appeal, even if insufficient for a suspensive appeal. Objections to an appeal bond urged in a motion to dismiss the appeal should be specific; those relating to the competency and solvency of the sureties should be made and disposed of in the lower court. Where an appeal is taken by and in the name of a commercial firm, there is no necessity for the names of the individual partners to be given in the bond. Who they are appears in the record. If an appeal bond be couched in language such as will enable the appellee to enforce it in manner and form, and to the extent the law directs, the appellee has no occasion to complain. Judicial bonds are tested by the law directing them to be taken. That which is superadded must be rejected, and that which is omitted supplied.

McSweeney vs. Blank & Co. et als., 292.

A devolutive appeal lies to test the legality of the action of a judge in refusing to allow a defendant to bond an injunction. The refusal by the court of an application of the defendant to

APPEAL—Continued.

bond an injunction does not bar a second application later nor is an appeal from the second refusal barred by a failure to appeal from the first. The District Court could have legally ordered, *ex officio*, a judicial sequestration of the property in litigation and have ordered the continuance of the same, until the rights of the parties should be decided. (C. P. 273-274.) It could, therefore, properly decline to allow the defendant to bond an injunction which plaintiff had had taken out which had the effect of maintaining the *status quo* during the suit. The court can still order a sequestration, or it can increase the injunction bond if the rights of parties can be better secured.

Sanders vs. Ditch et als, 333.

Plaintiff and appellant reserved his right to prosecute his appeal in his receipt handed by him to the defendant for an amount received after judgment in part payment of his claim, in terms sufficiently plain. The court overruled the motion to dismiss.

Staehle vs. Leopold, 399.

Where it appears that a title set up to property by one who claims possession under it is contested by the possessor of the property, who, fearing eviction, sues to annul the title and enjoins against eviction, the *possession*, of the property is not alone at issue, and the value of the property being in excess of \$2,000 this court, and not the Court of Appeal, has jurisdiction to entertain an appeal involving the controversy.

State ex rel. Horter vs. Judges, 487.

Where, in an action for the recovery of real estate, the defendant, by his answer, denies the asserted right of the plaintiff, and, in the course of the trial, exhibits a title in himself, and at the same time disclaims title in the land, but insists upon his ownership of the buildings situated thereon, and there is judgment rejecting plaintiff's demand and recognizing defendant as the owner of the buildings, the value of the land is not thereby eliminated for the purposes of appeal, and a motion to dismiss, predicated upon that theory, will not prevail.

City vs. Fredericks, 496.

Query—Where the principal and surety on a conventional bond are joined as defendants in a case which judgment is asked against

APPEAL—Continued.

the principal in a sum exceeding \$2000 and against the principal and surety *in solido* for a sum less than \$2000 (the surety's obligation under the terms of the bond being less than \$2000) and in which case a judgment is rendered against the principal and surety, *in solido*, for \$390, to which appellate court—Supreme or Court of Appeal—must the appeal taken by the surety be carried? *Held*—To the Court of Appeal.

Perkins, Receiver, vs. Lapeyronnie, 502.

Where, in a suit for the cancellation of an assessment, the sole question at issue relates to the validity of the assessment, no question of the constitutionality or legality of the tax being involved, and the amount of tax is less than \$2,000 this court is without jurisdiction and the appeal will be dismissed.

State ex rel. Zeigler vs. Assessors et als., 572.

Appellee should be cited personally or at his domicile when he resides in the State. If, after diligent search, he cannot be found by the sheriff and if he has no domicile at which to make a domiciliary service, citation served on his (appellee's) attorney will save the appeal from absolute dismissal. Delay will be granted in order that a regular service of appeal may be made. The transcript having been filed in due time and all requirements having been complied with, except the service of citation of appeal, which could not be made, because appellee could not be found, a citation of appeal may be served after twelve months have elapsed since the judgment of the lower court was rendered. Another citation of appeal ordered and time granted. Grounds of the motion were set forth by the appellee and decided by the court in denying the first motion. The same grounds cannot form the basis of a second motion to dismiss the appeal.

Levy vs. Levy et al., 576.

Where a bond for suspensive appeal is filed after the delay fixed by Act No. 163 of 1898 it is a matter of no interest to the party applying for the appeal whether the Act is unconstitutional or not, since, in such case, the delay fixed by Article 117 of the Constitution, which Article is self-operative, must have expired. Where an execution is enjoined on a sworn allegation that timber worth a certain amount has been seized and an order is made dis-

APPEAL—*Continued.*

solving such injunction on a bond for a like amount, the damages which may result from such dissolution sound in dollars and cents and are not irreparable, and no appeal lies.

Lumber Co. vs. Sheriff, 621.

The fact that the defendant, against whom a decree of separation from bed and board has been rendered, which is still subject to devolutive appeal, makes the objection that the judgment is final and that an action brought by the plaintiff for the partition of the community presents new matter and should be filed and docketed as a separate suit, does not amount to an acquiescence in the judgment of separation from bed and board and does not cut off the right of appeal therefrom. Whilst it is true that a moneyed demand, coupled with a demand for separation from bed and board, may be incidental thereto, and may be carried with it for the purposes of jurisdiction, and whilst it is true that the appellate jurisdiction of this court extends to suits for separation from bed and board and for divorce "and to all matters arising therein," it does not follow that such jurisdiction extends to a suit, brought after a judgment of separation from bed and board has become final, for the partition of community property valued at less than \$2000, when it appears that there was no demand for such partition in the suit in which such judgment was rendered and that no question of partition was raised on the trial, or passed on in the said judgment. *Non constat* but that the parties might intend to pretermitt the partition indefinitely and transmit it to their heirs.

Melancon, Wife, vs. Wilson, Husband, 628.

ASSESSMENTS—

As long as the present legal ownership of trees standing upon the roots upon a plantation remain in the owner of the land, they must be assessed with the land and as forming part of it. Where the owner of land makes a contract with another by which he conveys the latter rights in respect to the trees standing by the roots on the land, but rights which fall short of conveying present ownership thereto, assessors are not warranted in separating, for the purposes of assessment, the trees from the land, and making the trees the object of direct taxation as corporeal movables distinct from the

ASSESSMENTS—*Continued.*

land to which they are attached. They cannot bring about a severance in the present ownership of the trees and the land, which does not result legally from the contract. The liability of the party who makes such a contract with the land owner to taxation under his contract rights, would not be enforceable under an assessment made in his name upon the trees themselves. Individuals may make agreements or dispositions as to taxation and as to the payment of taxes which may be binding as between themselves, but such agreements or dispositions cannot have effect as against the State, when, thereby, the parties themselves or the objects of taxation with which they deal are not brought within the grasp of the laws governing taxes and the enforcement of taxes. Assessors and tax collectors, in their action, cannot go outside the existing statutes.

Williams vs. Sheriff and Tax Collector, 92.

Where a title to real estate is vested in two persons, who hold in indivision and in equal proportions, the whole property may be assessed to both owners without specification as to their respective interests, though it is otherwise when each owns a designated portion of the property or they own unequal proportions; and, in the former case, if the assessment is regular as to one of the co-owners, he can have no reason to complain that it is defective as to the other, since such defect can work him no prejudice. The doctrine that proceedings conducted against and in the name of one who is dead, and which lead to the sale of property for taxes, convey no title, is inapplicable where the holder of the recorded title is living. In such case, neither the assessor nor the collector is bound to go beyond the recorded title in search of the owner.

Howcott vs. New Orleans, 305.

BILLS AND NOTES—

Where a person who places his signature on a promissory note for the further security of the holder, whether he be considered a surety or co-maker, gives his written consent that the payment of the note be extended to a fixed date, but the extension is not granted by the holder, such consent, regarded as an acknowledgement, has no other date than that which it bears, and the prescription applicable to promissory notes begins to run in

BILLS AND NOTES—*Continued.*

his favor from that date, and not from the date to which the consent refers. The mere fact that the holder of a note has failed to sue on it will not justify the inference that he consented to extend the time of payment, in the face of positive testimony to the contrary. *Mutual National Bank vs. Coco*, 268.

BOARD OF HEALTH—

Act 192 of 1898, in establishing the State Board of Health, and requiring it to see to the inspection of coal oil, throughout the State, by reasonable implication confers upon said board authority to provide the means of defraying the expense of such inspection in the usual manner, to-wit: by the exaction of an inspection fee from the dealer in the oil, and such fee is not a tax, but a charge for services rendered. *Board of Health vs. Oil Co.*, 713.

CHILDREN—

Article 203 of the Civil Code is not prohibitive in terms, and must be taken and construed with another *in pari materiae*, viz.: 209 of the Civil Code, regarding the modes of acknowledgement of natural children. Succession of Fortier, 51 A. 1585; Lange vs. Richard, 6 La. 570. This view finds some support in 4 A. 305, cited with approval in 33 A. 1104. In the last cited case the court said of a decision holding views not entirely in accord with the first cited case, *i. e.*, the case of Dugas vs. Caruthers, 6 A. 158, that it was the *dictum* of the organ, and not the opinion of the three judges composing the majority, with which the court in 33 A. 1104 did not agree. In the 6th Annual case the natural brother and sister were acknowledged to some extent at least. Between heirs acknowledged as required by Art. 209 C. C. and collateral heirs not acknowledged at all, the court holds that the former are entitled to inherit.

Bouriaque vs. Charles, 217.

COLLATION—

An heir cannot be compelled to collate an amount expended to send him to school, although he failed in availing himself of the opportunity offered him to attend school. Art. 1244 C. C. Colla-

COLLATION—*Continued.*

tion is not due of amounts expended to defend a minor against whom a criminal charge had been brought. The cardinal object of the *collatio bonorum* is equality in the partition, in order to prevent jealousy and bickering among heirs about property. The law would fail in its object if heirs were made to collate unless upon ample proof that collation is due. An heir by whom collation is due for the amount of a note bearing interest is a debtor for principal and interest for collation. Grandchildren who elect to take as heirs must return to the mass a legacy left them in satisfaction of their portion. Grandchildren apparently in the attitude of having accepted a succession and the gifts made to their father by their grandfather cannot claim from their grandparents' succession without regard to the benefit received by themselves from the gifts they wish to ignore. Collation is due by grandchildren to grandparents for care and board and lodging. They are entitled to credit for work done by them for their grandparents. A legacy not left to forced heirs as an extra portion must be returned to the mass of the succession, in view of the fact that it is evident the testator intended it in full satisfaction of all claims as heirs. Heirs cannot exercise the rights of creditors against their co-heirs in order to benefit themselves by showing an attempt of a co-heir to shield his share of inheritance from the pursuit of his creditors. An heir who admits that the amount represented by his note is due as collation, cannot sustain prescription as a bar to recovery of interest on a note bearing interest. The heir having admitted an indebtedness to the succession growing out of joint venture is debited. Costs of a prior suit on appeal follow the judgment. *King vs. King*, 437.

COMMUNITY—

A wife, or widow, claiming as her separate estate property purchased during the community, must prove, first, the *paraphernal* character of the funds used in the purchase; second, her *separate administration* of these funds; third, *their investment* in the property in question. When, during marriage, a wife buys property with her separate, paraphernal funds, intending the purchase to be an investment of such funds, it is not essential that the act of pur-

COMMUNITY—*Continued.*

chase should recite the fact that she is buying with her separate funds under her own administration and for her sole account, and not that of the community, though it is advisable always that such declaration be made in the deed. But when *the husband*, during marriage, buys property in his name intending it as an investment of his separate funds, to be held for his individual account and not that of the community, it is essential that some indication of this intention, and of the character of the funds used, be given in the act of purchase. Improvements put, during marriage, upon the wife's separate landed property at the expense of the community, may be claimed by the wife at the dissolution of the community, but she owes the community their value.

Succession of Burke, 82.

CONSTITUTIONAL LAW—

The rule is that an act of the General Assembly must be held constitutional unless its repugnance to the organic law is apparent and reasonably certain. Courts are not justified in holding a statute void because of mere doubts arising on the construction of the two—the statute and the Constitution—the one in reference to the other. That construction must obtain which would give the statute constitutional life rather than another construction, of which it might be susceptible, which would strike it with constitutional death. The constitutional declaration that the courts shall be open, and every person, for injury done him in his rights, lands, goods, person or reputation, shall have adequate remedy by due process of law, etc., is not to be understood as taking from the Legislature the power to prescribe reasonable rules and regulations relative to the costs incurred in litigation. Regulating the collection of costs due to clerks of courts and other officials (a phrase found in the title of the act assailed), is a term broad enough to cover the requirement of security for costs which the statute authorizes the defendant to exact of the plaintiff.

Grinage vs. Times-Democrat Publishing Co., 121.

CONTRACT—

The undertaking of the cold storer being to preserve goods liable to undergo, or actually undergoing, deterioration through the develop-

CONTRACT—*Continued.*

ment in them of insect life, it is not necessary, in order to recover against him for damage to goods, to prove more than that the goods, when delivered into his cold storage, were, according to the usual and ordinary test of commerce, sound. For the deterioration of the goods while in his cold storage he is responsible, notwithstanding that in the heading of the receipt issued for the goods there is printed a limited liability clause to the effect that he is not responsible for "damage" to goods. Interested persons are by our law competent witnesses, and their testimony is binding on the court, unless overcome by counter-testimony or irreconcilable with the known facts of the case. The warehouseman has a right to hold possession of the goods stored with him until the amount due him for storage is paid. The amount due for storage on goods cannot be compensated by an unliquidated claim for damage suffered by the goods. A cold storage company may, by contract, limit its liability to the extent that liability may be limited. The limited liability clause should be specific and include in its terms all damages and acts for which the cold storer does not hold himself responsible. A paper admitted in evidence, without objection, will be taken as the commencement of proof of a particular fact. The holder of the receipt is entitled to delivery of the property stored upon tender of payment of charges on the property itself, and payment of charges on other property of owner cannot be required before delivery. There must be a tender made in due form of the charges. Storage is due on damaged goods for which the storer is made to pay.

Marks & Rittner vs. Cold Storage Co., 172.

A contractor who has unadvisedly refused to perform his contract may, while the situation of things is unchanged, retract the refusal, and go on with the contract; and is not cut off from so doing by the service upon him of a notice to the effect that the contractor will hold such a refusal to be a default and will sue to dissolve the contract.

The facts being, as follows: that in March 1898 A and B entered into a contract by which A was to furnish irrigation water and B to make a rice crop and pay water rent; that B denied owing any water rent for 1898, claiming that owing to the insufficiency of the water service the crop had suffered loss to an amount more

CONTRACT—*Continued.*

than off-setting the water rent; that A did not press the payment of the rent, although B was well able to pay and could be made to pay; that in March 1899 the parties entered into another contract materially amending the contract of 1898, but making no allusion to the water rent for 1898; that thereafter A did not renew the claim for his water rent, not even when in February 1900 written demand was made for the payment of rent due, and presumably of all rent due; that the claim was renewed for the first time in defense to a suit by B to annul for non-performance of the contract in question, held: this debt for rent of 1898 is presumed to have entered into the contract of 1899 as part of the consideration thereof, although not expressly mentioned in the instrument evidencing said contract. The modes of extinguishing obligations specified in Article 2130 of the Civil Code are not exclusive.

Perkins vs. Frazer & Mason, 390.

A contract entered into has the force of law between the parties. Their rights under it are to be determined by that interpretation of its provisions which gives the greater assurance of arriving at the intention of the parties.

Railway Transfer Co. vs. R. R. Co., 645.

CORPORATIONS—

Where a private corporation, created under State law, misuses the franchises conferred upon it, with respect to matters which are of the essence of the contract between such corporation and the State, and the acts, or omissions, complained of, are willful and repeated, and inflict injury upon the public, generally, they constitute just ground for the forfeiture of such franchises and the dissolution of the corporation. The charter of the defendant company, being Act No. 33 of 1877, Extra Session, as amended by Act No. 43 of 1878, prohibits said company, in express terms, from charging higher rates for the water to be supplied by it than were charged by the City of New Orleans at the date of the passage of said act of 1877; and, as the evidence adduced in this case shows that the defendant has willfully and persistently disregarded this prohibition, its charter and franchises are declared forfeited. A private corporation, upon which has been conferred the exclusive privilege of supplying water to a large community for a number of years, upon

CORPORATIONS—*Continued.*

condition that its charges shall not exceed those paid to the municipal corporation which preceded it in control of the works, and which is vested with possession and control of the books of the municipal corporation in which those charges are recorded, should preserve such books in safety, and failing, satisfactorily, to account for them, must be held guilty of negligence, and can derive no advantage from their loss. In a suit by the State to have decreed forfeited the charter of such corporation for the violation of its prohibitions and the non-fulfillment of its obligations, records in suits, litigated between the corporation and members of the community affected, in which such violations and non-fulfillment, *quoad* the individual litigating, have been judicially ascertained and determined, are admissible in evidence as against the defendant. So, also, the testimony of a witness given upon the trial of such a suit, between the corporation and a member of the community affected, may be admitted in evidence for the purposes of the suit brought by the State, though the witness, when placed on the stand, is unable to identify the type-written instrument purporting to contain such testimony, and, by reason of the lapse of years and advancing age, is unable to recall the facts to which he formerly testified; *provided*, that the instrument is otherwise identified as containing the testimony which had been given by the witness and the witness affirms that such testimony was true when given.

State vs. Waterworks Co., 1.

Courts are very reluctant to interfere with the control of the affairs of a private corporation at the instance of a stockholder, or of a minority of the stockholders; but it is their right and their duty so to interfere in a proper case; and a proper case is shown where there is gross mismanagement of the business of the corporation, such as would, under the laws of the particular State in which the corporation is doing business, furnish grounds for the appointment of a receiver; or such as amounts to a clear breach of duty on the part of the managing officials of the corporation under their trust. There is such mismanagement and clear breach of duty where the officers of the corporation have sold 15 per cent. in amount and vastly more than 15 per cent. in value of the assets of the corporation (all real estate) at approximately one-seventh of its value, thereby apparently entailing a loss of \$2,618,000 on the

CORPORATIONS—*Continued.*

corporation, and \$870,000 on the complaining stockholder; and refuse or neglect to bring suit to set aside said sale, although the right to cause the sale to be set aside on the ground of lesion beyond moiety appears to be unquestionable under the laws of the State in which the property is situated. The petition of a stockholder alleging such gross mismanagement, and alleging that the complainant has exhausted all available means for obtaining redress through corporate agencies, and impleading the corporation and the purchaser, and praying that the sale be set aside for lesion beyond moiety, shows a cause of action.

Watkins vs. Land and Timber Co., Ltd., 107.

Where an association is carrying on business claiming corporate capacity and corporate protection, the State has the right, by judicial action, to test its claims, both as to its organization and as to the business it is conducting, being such as falls within the permissive terms of statutes authorizing the creation of corporations. It has the right to hold matters in abeyance by injunction, for the protection of all parties in interest, until the termination of such a suit. Its duty ends when it has caused to be set aside the association's claim to corporate capacity and protection. It is not charged with the duty of protecting rights of parties placed in position to protect themselves.

The mere fact that the affairs of such an association have been prematurely or irregularly settled by those having actual control of its assets, furnishes no ground for the appointment of a receiver at the instance of the State itself, when all debts have been paid and all parties in interest are satisfied and the business in the State has ended. The State is no longer concerned in the matter.

State vs. Debenture Redemption Co., Ltd., 562.

CRIMINAL LAW—

ADMISSIONS BY THE STATE—

Where the State admits, under Act 84 of 1894, for the purpose of avoiding a continuance, that an absent witness would, if present, testify to certain material facts, proof of counter-declarations made by the witness on another occasion will not be received in evidence. To admit the same would be in violation of the rule requiring a foundation to be laid before introducing the impeaching evidence.

State vs. Guy et al., 573.

CRIMINAL LAW—*Continued.*

APPEAL—

There was a disagreement between relator's counsel and respondent regarding the date of the court's adjournment which led counsel, in good faith, to arrive at a conclusion different, the trial judge says, from that which he intended. The junior counsel was in court when the defendant was sentenced. He had previously informed the judge that he understood that no appeal would be taken. No bill of exceptions was presented or motion for new trial made. The court, after adjournment, had no authority to grant an order of appeal in a criminal case, which, under the statute, must be applied for and entered in open court prior to adjournment.

State ex rel. Edwards vs. Judge, 781.

It is settled that an averment that the verdict is contrary to law and evidence brings up no ground for review. The statement of the trial judge embodied in the bill of exceptions that there was a case pending in which the defendant attempted to bribe a witness is accepted as correct in the absence of testimony on the subject.

State vs. Williams, 790.

ARRAIGNMENT AND PLEA—

The record failing to disclose that the accused was arraigned, or that he pleaded to the indictment, or was called upon to plead, the verdict and sentence cannot stand. *State vs. Preston*, 521.

ARREST OF JUDGMENT—

In the motion in arrest of judgment, the defendant averred, without reference to any particular ruling of the District Court, that errors had been committed prejudicial to his defense. It is settled by repeated decisions that in a motion in arrest of judgment, in order to be entitled to relief, the defendant must set forth the errors the record shows to his prejudice.

Although this is the well settled rule, the court examined the record and found no error falling within the scope of a motion in arrest of judgment.

It is within the discretion of the court *a qua* after verdict and after the filing of a motion in arrest of judgment to order, in the presence of the defendant, in open court, the minutes to be corrected and made to correspond with the facts of the case. The record does not show that the facts of the case were not as stated in the minutes.

State vs. Bouline, 454.

CRIMINAL LAW—*Continued.*

ATTENDANCE OF WITNESSES—

Until an accused has had the benefit of compulsory process for securing the attendance of his witnesses he cannot be forced to trial; not even on the offer of the prosecution to admit that the witness if present would testify as it is claimed he would.

An accused has not had such benefit when the witness has not appeared and the sheriff has made no return, and it is not known whether a summons timely placed in his hands has been served or not.

An order for the attendance of a witness from a neighboring parish stands good until revoked, or until to the knowledge of the accused such witness has removed from such parish; and such order need not be renewed at the succeeding term, or terms, of court when the case has gone over. *State vs. Fairfax, Jr.*, 624.

BILLS OF EXCEPTION—

Bills of exception should be submitted to the District Attorney for inspection prior to being handed to the court for signature.

State vs. Johnson, 546.

A bill of exceptions, in that part of it where the trial judge gives the reasons for his rulings, did not deny the previous statement of the bill that a witness, called in rebuttal by the State, was permitted to impeach a witness for the defense by giving evidence that defendant's witness had, on a previous trial, testified differently from what the State, in the instant trial, admitted he would swear to were he present—*Held*, that since the bill is signed by the judge, and since that part of it which he wrote does not deny the specific averment, it must be accepted as true and effect given to it.

State vs. Guy, 573.

CHARGE OF COURT—

The judge may refuse to give a special charge the matter of which has been already substantially covered in the general charge.

State vs. Sims & Mays, 188.

The charge of the court in a criminal case must be assumed, in the absence of proper recitals, to have been given under circumstances warranting it.

State vs. Johnson, 546.

CRIMINAL LAW—*Continued.*

The time for urging objection to the charge of the judge to the jury is before the retirement of the jury. Such objections, if urged for the first time on motion for new trial, will not be considered by this court. The grounds of such objections must be stated, so as to inform the trial judge of the nature of the objection and afford him an opportunity to rectify the matter complained of. The degree of particularity required in stating these grounds will depend upon whether the objection is based purely on law or partly on facts. To challenge the correctness of a legal proposition involved in a charge, it is sufficient to point out the particular part objected to and to say that it is not a legal charge; but to challenge the correctness of a charge because of its inapplicability to the facts, or because of its not stating the law with sufficient fullness, or in terms suitable to adapting it to the facts of the particular case, the respects in which the charge is deficient must be specified.

State vs. Weston, 45.

DISTRICT ATTORNEY—

District judges are authorized by law to appoint an attorney to represent the State when, from any cause, the district attorney is recused, necessarily absent, or sick. "Necessarily absent," as used in the statute, means necessarily absent *from the court*; not *from the parish*. The extreme illness of a grand-child, thought to be upon its death-bed, is held to have justified the absence of the district attorney from the court and warranted the judge in appointing a substitute. The attorney so appointed, having represented the State through the greater part of the trial, and having possessed himself of that knowledge of the facts necessary to the efficient argument of the case, is not to be retired from its further prosecution because of the reappearance in court, on the second day of the trial, of the district attorney. The trial is to be viewed as a whole, and *quoad* the same he remained the district attorney *pro tem.* to the end thereof. The cause which necessitated the absence of the district attorney having ceased, it was the duty of that official to report to the court; and, having done so, it is unobjectionable that he participate in the prosecution.

State vs. Smith, 129.

While the character of defendant had not been put at issue, yet he had been a witness in his own behalf. Comments of the prosecut-

CRIMINAL LAW—*Continued.*

ing officer are not cause to set aside the verdict, even though they may not have been directly suggested by the testimony. The closing remarks were immaterial, or at least were not prejudicial.

State vs. Williams, 790.

DYING DECLARATION—

A dying declaration must go in as a whole, and is not rendered inadmissible because some of its statements of themselves and if standing alone would be inadmissible. *State vs. Carter*, 792.

EVIDENCE—

If other witnesses than the accused could not legally testify to alleged antecedent threats because no foundation therefor had been laid by proof of overt act, neither may the accused, himself, do so, when called to the stand as a witness in his own behalf.

If the accused may not give such testimony under oath on the stand as a witness in his own behalf, neither is he permitted to do so when tendered by his counsel to make before the jury an unsworn statement in his capacity *as the accused on trial*.

Evidence of threats made by the deceased a short time prior to the killing is not admissible until foundation therefor is laid by proof of an overt act showing purpose to execute the threats.

It is the province of the trial Judge to decide whether the evidence submitted *pro* and *con* of overt act makes sufficient proof thereof to lay the foundation for the admission of testimony as to antecedent threats.

While his ruling in this regard is subject to review here, great reliance is placed upon his discretion and judgment in such matters—he having seen and heard the witnesses.

If evidence of a previous threat be not admissible because not accompanied then or afterwards by an overt, hostile act, it follows, logically, the statements constituting such threat cannot be admitted in evidence as part of the *res gestae*.

State vs. Periaux, 601.

Where, as part of his exculpatory evidence, an accused person seeks to prove admissions (not part of the *res gestae*) made by another person to the effect that it was he, and not the accused, who killed the deceased, objection to the evidence that it is hearsay was well taken.

CRIMINAL LAW—*Continued.*

Where the avowed object of alleged newly-discovered evidence is to discredit a prosecuting witness, the general rule is a new trial will not be granted. *State vs. Young*, 618.

GAMBLING—

The following is an article of the Constitution (Art. 188): "Gambling is a vice, and the Legislature shall pass laws to suppress it." Gaming unlawful by statute remain in force. Laws heretofore passed against gambling do not include betting on horse races in any form. Betting on horse races, in view of the bettors, within their means, is not unlawful, but, on the contrary, has the law's special sanction. The question whether the betting on races at a distance, out of view, through the medium of the turf exchange, should be suppressed as being gambling, is one left to the Legislature by the clear terms of the Constitution. The law grants an action for the payment of bets on games tending to promote skill "in the use of arms, such as the exercise of the gun, and foot and horse racing." If this article affords the opportunity of inducing patrons of races to gamble, to the extent that the gambling is carried on it should be legislated against under the article of the Constitution cited. Crimes and offenses are statutory; and, if acts become a public wrong against the policy of the State, and the State has designated the authority by which the wrong shall be declared, the authority remains where it has been placed by power. Gaming is to be prohibited by statute to be enforced by the courts.

Shreveport vs. Maloney and Schulsinger, 193.

INDICTMENT—

The oversight of the District Attorney in not signing the indictment is not fatal to the indictment.

State vs. Williams, 790.

INFORMATION—

The case did not, as made to appear on the merits, come within the supervisory jurisdiction of this court to the extent of rendering it necessary to set aside the sentence and judgment. The affidavit or information under which defendant was prosecuted informed him of the nature of the accusation to enable him to properly defend himself against the charge brought. The statute was substantially

CRIMINAL LAW—*Continued.*

complied with, also the ordinance of the corporation the defendant was charged with having violated. The defendant was not taken by surprise and the judgment will be *res judicata*.

State ex rel. Thomas vs. Judge, 764.

JUROR—

A man, called as a juryman, answered, on his *voir dire*, to counsel for defense, he thought the man who committed the homicidal deed ought to be punished, and that as soon as he heard of the case he formed that opinion. Challenged for cause, he was questioned by the court and answered he had no prejudice against the accused; as a juror, would decide the case according to the evidence as given by the witnesses and the law as expounded by the court; no outside impression or opinion would influence him in his verdict. *Held*, competent as a juror.

The mere expression by a citizen of a just indignation on hearing of the death by violence of another, does not disqualify him from jury service in the case.

It is objectionable for the defense to ask of jurors, on their *voir dire*, questions like the following:—"In a criminal prosecution, as a juror sworn to try a case and when forming your verdict, to whom would you give the benefit of the doubt—the State or the accused?" "If accepted on this jury would you give the benefit of any doubt created in your mind by the evidence to the accused and acquit him?" "Would that doubt have to be a very great one, or a reasonable one?"

It is for the trial Judge, at the end of the trial, to charge the jury relative to the law of "reasonable doubt," and it is not to be supposed in advance jurors will decline to heed the charge so to be given, or will refuse to be instructed by the court.

But in order to test the *animus* of a juror towards the accused, it may be permissible for the defense, *first explaining or having the Judge explain* the meaning of "reasonable doubt," its application to the case, and his duty to acquit should it exist, to ask the juror whether he would give the accused the benefit of such doubt.

Jurors are not competent as witnesses to impeach their verdict. A court must draw its knowledge of the misconduct of jurors from some other source.

State vs. Perious, 601.

CRIMINAL LAW—*Continued.*

LARCENY—

The law of Louisiana makes no distinction between larceny from the person and larceny otherwise than from the person. The thief who secretly steals money by picking the pocket of the owner is as much guilty of larceny as though he had stolen it otherwise than from the person of the owner.

State vs. Wilson, 344.

MANSLAUGHTER—

There is no error in a refusal to charge that "Where a man finds his wife committing adultery with a man, and, provoked by the wrong, instantly kills the adulterer, the homicide is only manslaughter." But, if it were otherwise, the accused, in this case, having been convicted only of manslaughter, could have sustained no injury.

State vs. Senegal, 452.

NEW TRIAL—

The failure of defendant in a criminal case to introduce evidence in his own behalf which was within his control, for the reason that he did not believe it was called for, under the evidence which the State had adduced against him, furnishes no reason for a new trial. In the District and not the Supreme Court is vested the right and power of determining whether a verdict rendered against defendant in a criminal case, was justified by the weight and sufficiency of the evidence adduced against him. When the District Court overrules a motion for a new trial, holding that the verdict was justified, the Supreme Court cannot review his conclusion, even though in a bill of exception reserved to this ruling, is embodied a *resume* of the testimony which was taken on the trial signed by the district attorney and counsel of the accused.

State vs. Miller, 796.

The trial judge held that the accused should have sooner discovered the evidence upon which they based their motion for a new trial and that it was cumulative. New trial will not be ordered on appeal until it is manifest that error has been committed. There is no evidence showing that the trial judge has exceeded the bounds of the discretion with which he is vested.

State vs. Maxey et al., 799.

CRIMINAL LAW—*Continued.*

PRESCRIPTION—

The statute clearly provides that no one shall be prosecuted for any fine unless the prosecution be instituted *within six months* of the time of incurring such fine, and does not admit of a delay within which to institute proceedings, as in case in which one is prosecuted for an offense barred by the prescription of twelve months from the time the crime is made known to an officer having authority to direct the prosecution. The recovery of the fine is *absolutely* prescribed in six months from the time the fine was incurred and is not negatived by the averment in the information that it was filed within six months after the commission of the act was made known to an officer authorized to prosecute.

State ex rel. Teague vs. Judge, 49.

PRIOR CONVICTION—

The objection brought to the attention of the trial judge, by motion for new trial, that the bill of information informed the jury that there had been a previous trial and conviction and new trial granted, comes too late.

State vs. Gonzales, 216.

RES GESTAE—

The statement was not a mere narrative of the wounded man. Declarations of one wounded made immediately after the wounding as to how it was inflicted or by whom, have been held admissible where voluntarily or spontaneously made at a time so near the act as reasonably to preclude all idea of design. One may by sign, he being unable to speak, given two minutes after the shooting to one to whom he runs and meets a short distance from the scene of the shooting, let it be known by whom he has been shot, and the declaration by sign is admissible as part of the *res gestas*.

State vs. Maxey et al., 799.

SELLING LIQUOR—

A conviction for selling one drink of beer to Ben Barnes, is not a bar to a prosecution for selling on the same day one flask of whisky to Austin Montgomery, unless the two sales are proved to have been one and the same transaction, constituting one sale. The one word "Sunday" conveys all the meaning that is conveyed by the phrase "the twenty-four hours immediately following 12 o'clock

CRIMINAL LAW—*Continued.*

Saturday night"; hence, under a statute forbidding stores to be kept open, or liquors to be sold during the twelve hours immediately following 12 o'clock Saturday night, it is sufficient to charge that the unlawful acts were committed on Sunday; especially is this so where in the title of the statute the word "Sunday" is used to designate the same forbidden space of time. The hour at which the forbidden acts were committed need not be specified; it is sufficient to charge that they were committed on Sunday. Whether the mere opening of a store on Sunday, without making any sales, violates Act 18 of 1886, commonly known as the Sunday law, *quaere?* But every separate act of selling from said store on Sunday, constitutes a separate violation of said act, subject to separate prosecution and punishment. *State vs. Heard*, 60.

SENTENCE—

Prior to sentencing a defendant in a capital case, he should be asked by the court whether he had anything to say why the sentence of the court should not be pronounced against him.

State vs. Ikenor, 480.

SHOOTING WITH INTENT TO KILL, ETC.—

In enacting Statute 44 of 1890, it must be presumed that the Legislature did not intend that the law should be construed without reference to established principles, and that in making it a crime to shoot a person with intent to kill it was intended to cut off the right of self-defense or any other reasonable or lawful use of fire-arms. Shooting in self-defense is actuated and controlled by the desire to protect one's life, and the desire to take life is not controlling and exclusive. It cannot be said to fall within the terms which denounce the act of shooting with intent to kill. In that view, the statute is not unreasonable nor absurd. *United States vs. Kirby*, 7 Wall. 482. Even if the statute be unreasonable, to decree it void its provisions must be found in conflict with the Constitution. L. R. A., Vol. 50, p. 56. The title of an act may assist in removing ambiguities when the intent is not plain. The title, as well as the statute, is adopted by the Legislature and shows the object of the statute. *Fisher vs. Plight*, 2 Cranch. 586; *Burgett vs. Burgett*, Vols. 1 and 2, p. 221, of the Ohio Reports. A title which serves to indicate the object of a statute cannot be held to

CRIMINAL LAW—*Continued.*

have misled the Legislature when it was adopted. "We, the jury, find the accused guilty of shooting with intent to kill," is a legal verdict under Statute 44 of 1890. *State vs. Broussard*, 107 La. 189. *State vs. Bolden*, 116.

While "with a dangerous weapon" is part of the definition of Sections 790, 791, 793, Revised Statutes, and Act 44 of 1890, the use of the words "shooting with intent to kill and murder" necessarily supplies the words "with a dangerous weapon." Shooting with intent to kill and murder adds to the sentence, by its meaning, the words "with a dangerous weapon," as one cannot shoot with such an intent as conveyed by the statute without the use of a firearm. The word "intention," as used in the indictment, is accepted as a sufficient substitute for the word "intent" of the statute. *State vs. Broussard*, 189.

There was no bill of exceptions and no assignment of errors, and the inspection of the record shows no error.

The fact that the defendant was asked by the trial judge if he had any statement to make prior to sentence was made to appear of record. The minutes were amended *nunc pro tunc*. The part of the record in which it appears was supplied through *certiorari*.

State vs. Stafford, 537.

STATUTE CREATING CRIME—

Act 44 of 1890, when reasonably interpreted is not obnoxious to the objection that it denounces as a crime an act which might be consistent with innocence. It is a rule of universal application that when a statute creates an offense and sets out the facts which constitute it the offense may be sufficiently charged in the language of the statute. In order to justify the courts in holding a statute to be void, it must be alleged and proved that it is unconstitutional. *State vs. Sonier*, 794.

VENUE—

Defendant charged with a transitory crime alleged to have been committed in a particular parish should, before the jury retires to its room for decision, except to a further continuance of the trial before it, if he objects that the evidence taken on the trial disclosed that as a fact the act was committed a few feet beyond

CRIMINAL LAW—*Continued.*

the parish line. He cannot take the chances of a verdict in his favor by the jury which would conclude the State with the right reserved to urge the invalidity if the verdict should be adverse. The verdict found in such cases disposes of the question of venue. Exceptions to the charge of a judge should be made at the time the charge is given and a bill of exceptions be then taken.

State vs. Harris, 325.

VERDICT—

The return of a jury in a criminal case should, with some reasonable certainty, identify the act charged to have been committed by the defendant with the statute under which he is found guilty. A verdict must accord with the terms of a violated statute. 10 A. 191; 35 A. 729; 36 A. 857; 40 A. 200. Courts should not go beyond words of the verdict. 50 A. 595; 34 A. 529; 38 A. 479. The essential facts must be found by the special or what is termed by commentators, a partial verdict. 48th Ann. 1071. In the decision upon which, not without ground, the defendants place reliance, it is said: "The special or partial verdict must contain the elements of the crime." *State vs. Vance*, 49th Ann. 1011. *Held*, that the verdict, whether considered as a verdict known as partial or special, does not contain the elements of the crime. The charge was shooting with intent to kill or murder. The trial judge properly refused to instruct the jury that the accused could be found guilty of assault, or of assault and battery. *State vs. Robertson*, 48th Ann. 106. The maxim *falsus in uno, falsus in omnibus* is properly, in its application, left to the jury. *Witnesses*, Rapalje, p. 319, *State vs. Banks*, 40th Ann. 739. One indicted for having been present, aiding and abetting, may under special statute, be found guilty as principal. *State vs. Littell*, 45 Ann. 655. A new trial granted on defendant's motion reopens the whole case, and has the effect of disposing of the plea of *autrefois acquit*.

State vs. Washington, 298.

DAMAGES—

A person cannot claim damages from another for loss of prospective profits of his business by reason of his having forced him to discontinue it by threats, where it is shown that the business

DAMAGES—*Continued.*

which was discontinued was the illegal selling of intoxicating liquors without a license. A person cannot make the forced discontinuance of an illegal act simply through threats, the foundation of a legal right. *Ex dolo malo non oritur actio*. A person seeking damages should come into court with clean hands. (State vs. McMaster, 2 La. 331; Boulard vs. Calhoun, 13th Ann. 445).

Prude vs. Sebastian et al., 64.

Where A was to get lumber from B and deliver it to C, and both contracts were broken, the one breach the consequence of the other; and in suits predicated on the respective breaches damages were allowed, measured by the difference between market value of the lumber and contract price; A after paying the judgment awarded to C against him cannot come back against B for the amount; it would be making B pay the same damages twice.

Barr & Hetterman vs. Henderson, 323.

The timber was taken from one of two tracts of land. On the land of plaintiff this timber was large, and corresponded in every particular with the timber it claims as having been taken from its land; on the other, from which the defendants claim the trees were removed, there was very little timber and it was small in size. The defendant admitted that he had taken timber from the plaintiff's land, but failed to settle for as much as he had taken. The weight of the evidence is with plaintiff, and for that reason defendants are held to pay an amount equal to the value of the trees at the time they were sold. Fifteen hundred logs were sequestered. Six hundred and forty-two logs had already been paid for, logs for each tree, which appears to be generally the number of and the defendants owe for the remainder, viz, calculating three logs usual to the tree.

Trust and Safe Deposit Co. vs. Holzell, 745.

DEPOSIT—

Plaintiffs, as heirs of their father, sue the defendant on a certificate of deposit. The defendant received a number of deposits; at the instance of the depositor, the account was changed from daughter to father at the latter's request. In the different transactions between the parties, a certificate remained uncalled for and was

DEPOSIT—*Continued.*

found among the father's papers many years after his death. The testimony of the treasurers who kept the defendant's books at different dates and the entries in the books to which they referred and swore, while testifying, as well as the utterances of at least one of the plaintiffs, before suit was brought, show that, owing to carelessness or oversight on the part of defendant's treasurer at the time, the receipt remained outstanding. The court holds that only one account was kept, and only one line of deposits, and not two, as contended by plaintiffs. The sums carried on this account, as due to plaintiffs, have been paid, and that the receipt they hold is without consideration. A book-keeper may consult his books to refresh his memory and testify to facts of which he has therein kept a record. The name of the depositor was not changed with the view of committing a wrong. The request of the one in whose name the deposits were credited, and the acquiescence of all concerned, leads the court to hold that the change in name of the depositor was not made without the assent of all concerned. A witness is not absolutely discredited because he does not recall that he has signed a receipt representing a large balance. A witness' testimony, if he is in good faith, may be unreliable as to a particular fact and not as to other facts. *Heirs of Moran vs. Catholic Society*, 286.

DONATION—

The right of plaintiff to sustain an action must be made evident before defendant can be made to show title in himself. An act of donation, null and void, cannot serve as a basis for a petitory action. Estoppel does not affect those who did not acknowledge the right which one claims. The asserted donor not being estopped and being at liberty as relates to the act of asserted donation to claim the property, and return into its possession as owner, those who bought this property without notice by recital in any deed in which they were concerned that this particular property had been donated are not bound by an informal act of attempted donation. The act was never accepted by the transferee, who died years ago. Irregularities in a tax deed and all errors of form not of such a character as to render a tax deed absolutely null and void, are cured by the prescription of three years. The tax deed attacked was not absolutely null and void. *Boyle, Tutor, vs. West et al.*, 347.

DONATION—*Continued.*

In interpretation of a last will and testament, effect must be given to the words of the bequest, "to be his as long as he lives," and construed with the other words of the will, to be carried out to the very letter as being intended as a "life estate," at the death of the legatee to revert to the heirs of the testatrix.

The clause is not attacked by the heirs, and the legatee, on the other hand, ask for its enforcement as being absolute and unrestricted.

When it becomes necessary to treat with the subject of life estate, it is possible, consistently with jurisprudence, to safeguard interests by requiring compliance with the laws relative to usufruct.

Succession of Weller, 466.

DRAINAGE DISTRICT—

Drainage districts established under laws existing at the time of the passage of Act 12 of 1900 cannot take advantage of the act without first reorganizing under its provisions. Drainage districts established under laws in existence at the time of the adoption of Article 281 of the Constitution may take advantage of the provisions of this article without reorganizing under Act 12 of 1900. Drainage districts organized under Act 37 of 1894 may levy the tax and issue the bonds authorized by Article 281 of the Constitution without having recourse to the provision of Act 12 of 1900, passed for the purpose of carrying said Article 281 into operation; that is to say, such districts may levy said tax and issue said bonds under the combined provisions of said Act 37 and said Article 281, and irrespective of the said enabling act. The limits of a taxing district must be fixed with certainty; especially where such district is authorized to impose a property tax, and still more especially where such tax must be voted for. Uncertainty in respect to the limits of such a district invalidates its organization, and as a consequence all taxes it may propose to levy and all bonds it may propose to issue. Any taxpayer of the district may urge such invalidity in resistance of the tax or in prevention of the issuance of the bonds. Drainage districts organized under Act 37 of 1900 cannot cut or open new drains without consulting the taxpayers of the district. The police jury has the power to divide the parish

DRAINAGE DISTRICT—*Continued.*

into drainage districts. Boundaries given by this body in its ordinance are set out with certainty enough to enable a surveyor properly to trace the lines. The southern boundary was not specially contested; it is sustained as sufficient as set out in the ordinance of the police jury and afterward by a map deposited at the courthouse of which it is conceded the voters of the district had notice. The notice of election referred to this map and the ballots also. The canal which was to form part of the southern line was a canal proposed at the time that the ordinance was adopted and its course was well known, and it, as well as the limits of the arable land, are *indicia* enough of the boundaries, to prevent uncertainty as to the limits of the drainage district.

Richard vs. Drainage District, 659.

EMANCIPATION—

Where, to a preponderance of evidence, to the effect that a female minor, applying for emancipation, is capable of taking care of herself and her property, is added the opinion of the trial judge, before whom she has testified, to the same effect, and it also appears that the tutor, who is not related to his ward, is unable to take her into his house, or to exercise personal supervision over her, a judgment of emancipation will not be disturbed.

Emancipation of Begué, 744.

EVIDENCE—

Plaintiff, after the defendant had failed to produce testimony, which plaintiff avers was taken in answer to interrogatories, assumed to supply the testimony in her own behalf which testimony defendant had (according to plaintiff's averment) taken in its behalf and which plaintiff contends is favorable to her cause.

After plaintiff had undertaken to have the witness examined under commission, continuances were obtained by plaintiff.

It was not made evident that the commission was executed, and, in consequence, the court holds that defendant cannot be held bound for the failure to produce the return of the commission.

Instead of insisting upon the return of the commission, plaintiff herself sought to have the testimony taken and filed to show proper

EVIDENCE—*Continued.*

diligence in this attempt. She was without right to return to the act of omission charged in matter of this testimony and made it a ground to reinstate her suit.

Granting or refusing a commission is a matter within the discretion of the court of the first instance and unless arbitrarily granted or refused affords no ground to set aside a judgment of non-suit.

Wetta, Widow, vs. R. R. Co., 383.

Where a trial judge refuses to order that a commission issue to take the testimony of a witness for the purposes of the trial of a matter pending before him, on the ground that the interrogatories propounded show that such testimony would be irrelevant and impertinent, the remedy is by appeal from the final judgment thereafter to be rendered and not by *mandamus* directing the issuance of the commission. *State ex rel. Bank vs. Judge, 474.*

HUSBAND AND WIFE—

Where immovable property in this State purports to have been sold by a husband to his wife for a certain sum of money, the title is invalid on its face, the apparent consideration not being within the exceptions provided by C. C. 2446 as essential to the validity of a sale in such case, and the property is liable to seizure by the creditors of the husband.

Where property so situated is seized upon a claim against the husband, and the wife intervenes, setting up title, and the seizing creditor propounds to her interrogatories on facts and articles, her answers thereto are entitled to no greater effect, as against such creditor, than her testimony, or that of any other witness, given orally.

Where the seizing creditor, in propounding such interrogatories, takes the initiative and attempts to show that the consideration of the putative sale was other than as stated, either in the intervenor's title or in her intervention, and, thereafter, fails, in this court, to ask for any ruling upon his objection, made during the trial, to the introduction of parol evidence to show the real consideration of such sale, it will be presumed that the objection is abandoned.

HUSBAND AND WIFE—*Continued.*

Where the answers to such interrogatories show that property in another State had been conveyed by the husband to the wife for a particular consideration, arising under the laws of that State, this court will not assume, even though it should be made to appear that such consideration was inadequate, that a different consideration, testified to as moving in the matter of the conveyance of the Louisiana property, was, therefore, included and exhausted for the purposes of the conveyance in such other State.

The validity of the conveyance of immovable property in Louisiana, and the capacity of a husband and wife to deal with each other with respect thereto is to be determined by the law of Louisiana.

A sale of such property, between husband and wife, can be made only in the cases, and for the consideration, as provided in C. C. 2446, and if, apparently, made for some other consideration, is invalid on its face, and if attacked, by a party showing sufficient interest, the burden of proof, if proof be admitted, rests upon the party seeking to maintain the validity of such sale to show that the real consideration was within the exceptions provided in said article.

If, in such case, the claim be that the consideration was an indebtedness of the husband to the wife, for money said to have belonged to the wife and to have been received and used by the husband, it must be shown, where the parties are domiciled in another State, that, by reason of such receipt and use, the husband became the debtor of the wife, that the debt existed at the time of the conveyance, and that the property was conveyed in satisfaction, or in part satisfaction, of such debt.

Whether, in such case, the husband becomes the debtor of his wife depends upon the law of their domicile.

The courts of Louisiana will take judicial cognizance of the prevalence of the Common Law in a sister State and of the rule of the Common Law, that a married woman cannot possess personal property independently of her husband, except where a trust has been created for her separate benefit. But statutory modifications of the Common Law, or the creation of such trust, must be proved, if either be relied on.

Rush et al. vs. Landers, 549.

INSURANCE—

It is not improper practice to join with the insured, as plaintiff in an action on a policy of assurance against fire, the party who is named in the policy as beneficiary thereof to the extent that his interest may appear. After the Insurance Company's adjuster had visited the scene of the fire, had taken the measurements of the burned building, had suggested the employment of an architect to make estimate of the cost of replacing the structure, had possessed himself of the books and invoices of the insured, had gone over them carefully, had acquired information of all necessary facts and figures and then had made the insured an offer of a given sum in settlement of the loss, which was declined, the company is not in a position, when sued, to urge in defense that it is not shown any written notice of the fire, nor preliminary proofs of loss were not delivered to it as the terms of the policy require. The fact that the tax collector had recovered a judgment against the insured, which had not been paid at the date of the insurance, and which operated as a lien on the property, and the fact that the land upon which the storehouse was located was still encumbered with the vendor's privilege to secure part of the original purchase price, did not invalidate the contract of insurance in the absence of a showing by the defense that a particular statement of interest had been required of the insured, either by the terms of the policy, or otherwise, and he had made fraudulent concealment or misrepresentation of such interest. The fact that the insured owed debts, which operated as a lien or mortgage on the property, did not take the property out of the category of the "unconditional and sole ownership" requirement of the policy. The clause in the policy to the effect that "the entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void in the change, other than by the death of the assured, take place in the interest, title or possession of the subject of insurance (except change of occupants, without increase of hazard), whether by legal process or judgment, or by voluntary act of the assured, or other wise," was not invalidated by a mere formal seizure by the sheriff of part of the goods insured, which did not actually dispossess the insured.

. *McClelland vs. Ins. Co.*, 124.

JUDGMENT—

The prescription to be applied, in any given case, is that established by the law of the forum, and the prescription ordinarily applicable to judgments in this State is ten years, under C. C. 3544. An exception to this rule is established by R. S. 2808, which provides that, where a judgment has been rendered in another State, between parties there residing, and has become barred by the law of such State, and the judgment debtor has thereafter come to Louisiana, the prescription established by the law of the State *a quo* will be applied to such judgment in this State. But, where the judgment debtor comes to this State before the judgment against him is prescribed by the law of the State in which it was rendered, and is here sued on such judgment, the case is not within the exception, and the only prescription to be applied is that established by Article 3544 of the Civil Code. And where the action on the judgment is begun and citation is served within ten years from the rendition of said judgment, the prescription so established is interrupted. Under the Revised Code of Mississippi of 1880, a writ of attachment commands the sheriff, not only to seize the effects of the defendant, but to *summon* the defendant, if he can be found; and, where the return shows that the defendant has been summoned, no further evidence to that effect is required to enable the plaintiff, who obtains a personal judgment upon such summon, to maintain an action in this State upon the judgment so obtained. But where the writ commands the sheriff to summon the firm of A & B (which is composed of A and B), and the return shows that A & B have been summoned, such evidence is insufficient to justify the conclusion that C, a member of A, B & Co. (a firm which had succeeded the firm of A & B), has also been summoned; and hence, an action against "C" cannot be successfully maintained in the courts of this State upon a judgment against "C," where the record contains no other evidence that "C" was summoned. Where one commercial firm is cited and another condemned, the judgment is null for want of citation; it is null even as against those members of the condemned firm who happen to be members of the cited firm; and this, although both firms owe the debt. A partnership is a legal entity entirely separate from its members; and two firms are separate legal entities, though one has grown out of the other by the admission of a new member.

Newman vs. Eldridge, 315.

JURISDICTION—

Appellate courts have jurisdiction of incidental demands, and, particularly, over costs, such as depend on the event of a suit which are to be paid after its termination. The judgment is intended to embrace within its terms all questions regarding costs. If, for any reason, there remains an undecided question regarding the costs, after the decision has been rendered, and a question of the interpretation or construction arises, the court by which the judgment was rendered, is the court of competent jurisdiction. The Court of Appeal had not rendered the judgment on appeal in which the costs were incurred. The judgment was rendered by the Supreme Court, and this court is vested with jurisdiction of a rule to tax costs in its own judgments.

State ex rel. Johnson vs. Judges, 69.

Plaintiff claimed \$2,500 as the value of certain property belonging to his principal and seized under an execution against another person. He also claimed various items, in the way of damages, aggregating \$775. On the day upon which the suit was filed the property in question was surrendered to him and he took possession of it without condition or reservation. The amount left in dispute being but \$775, this court is without jurisdiction, and the appeal is dismissed. *Kaufman vs. Sheriff et als.*, 144.

When by *remittitur* entered before judgment in the lower court the amount in dispute is reduced to below the jurisdiction of the appellate court, the latter court has not jurisdiction.

State ex rel. Taylor vs. Judges, 784.

LEASE—

The acceptance of the lessee was not substantially different from the offer of the lessor.

The method of having his rent paid gave rise to no difference between the parties. The parties disagreed about the amount of the rent, and when in the end the tenant agreed to pay the amount as he understood to have been asked by plaintiff, there was no question raised regarding the amount of the respective instalments, the total of which instalments is the same whether as claimed by plaintiff or as accepted by defendant.

The evidence is conflicting, defendant swearing affirmatively and

LEASE—*Continued.*

plaintiff stoutly denying. Between positive testimony regarding what was said or done at a particular time and negative testimony, the latter is generally considered of less weight, when it becomes merely a question of correctness or things remembered to have occurred or been said, the facts and circumstances of the case not being such as to prevent the unjust operation of the rule. *Guesnard vs. Executor*, 33 Ann., 800; *Law of Evidence*, Jones, Vol. 3, p. 901.

Where an issue was not raised in the District Court on appeal a correction of the judgment will not be made unless it is evident that the party asking for the correction in argument will be prejudiced in some right.

The controversy is brought to an end by deciding in effect that plaintiff is the lessor of the defendant and that the latter owes rent as set forth in the decision. This view invests plaintiff with every right an amendment would afford.

Staehle vs. Leopold, 399.

LESION—

In setting forth a cause of action for annulling a sale because of lesion beyond moiety it is not necessary to allege that the complainant, or any one else, is willing to buy the property at double the amount of the price of the sale complained of. It is sufficient to allege the discrepancy between price and value. The fact of anyone being willing to buy the property at the increased appraisal is merely a fact to be considered on the merits in proof of the alleged greater value. For the purpose of the trial of an exception of no cause of action, all the well pleaded allegations of fact of the petition are taken for true.

Watkins vs. Land and Timber Co., Ltd., 107.

LIBEL AND SLANDER—

Whilst the plaintiff did not, as did the defendant in one of its letters, use a word which should not have been used, it was equally as aggressive in its methods to uphold its business. It chose, without first going to law, to charge the defendant with having infringed its rights under the patent it holds. The defendant sought

LIBEL AND SLANDER—*Continued.*

to retaliate by writing to those with whom it dealt or sought to deal. Plaintiff brought suit in the United States Court against the defendant, and defendant against the plaintiff. Each charged the other with fraud against the patent laws. The question as to who is the offending party and who has committed the damages will have to await the determination of the issue as to who was the infringer on the other's patent. Each pleads that the other is the infringer in justification of the letters he has written. That issue can be determined at the same time, or after it will have been determined who has violated the patent laws. One who seeks damages growing out of an alleged libel must, in proper issue, show that he himself is not at fault.

Burt & Co. et als. vs. Mfg. Co., 231.

In an action for damages for libel, where "privilege" is set up as a defense, the evidence should be confined to the question of privilege, *vel non*, save in so far as it may be admissible in mitigation of damages. In such a case, an amendment setting up the truth of the alleged libel in justification, may be allowed, if the offer to amend be reasonable as to time. The defense is not inconsistent with that of "privilege," and there is no change of issue in the sense of substituting one issue for another. Reports made by police and detective officers to their superiors and inscribed in books kept for that purpose, are not judicial proceedings and no privilege protects their publication. Nor, does any privilege protect the publication of the opinions, suspicions, or deductions, of such officers, otherwise imparted, whether to their superiors or to other persons.

Billet vs. Publishing Co., 751.

LICENSE TAX—

When the State Tax Collector proceeds to enforce the payment of additional licenses, for past years, exceptions and defenses to the effect that the licenses have been paid upon the basis of sworn statements, made by the party proceeded against and accepted by the then tax collector, and that such collector, or his successor, is without authority so to proceed, and is estopped; that the law providing for the collection of such licenses has been repealed; and that the law under which the proceeding is conducted confers no

LICENSE TAX—*Continued.*

authority therefor; that the collector has failed to proceed promptly, with his collections, to keep a license register, and to furnish a list of delinquents; and that he has no right to demand penalties, present questions which affect not the constitutionality or legality of the tax, but the remedy of the State and the alleged omissions, errors and unauthorized proceedings of her officers in the matter of enforcing payment of such tax, and, hence, confer no jurisdiction on this court.

State vs. Delgado & Co., 72.

Where a license levied under a parish ordinance, which was passed without the observance of some legal requirements, has been voluntarily paid, it can be recovered back on the ground of error only under exceptional circumstances. (*Multa fieri prohibentur quae si facta fuerint obtinent firmitatem.*) The fact that the State has fixed State licenses for pursuing occupations for six months at one-half of that for pursuing them for one year, does not carry with it the obligation on the part of the Police Jury to follow the same rule in fixing the parish licenses to be paid by dealers in distilled, alcoholic or malt liquors. *Fuselier vs. St. Landry Parish, 221.*

Act 171 does not authorize the levy or collection of a license from the owner of property for the carrying on of an occupation or business by his lessees, in which the owner himself does not participate.

State vs. Opera Association, 284.

The law requiring Police Juries to publish their estimates of expenditures during thirty days preceding the imposition of the tax, applies as well to license as to *ad valorem* taxation, and is not substantially complied with, as to the former, when the license ordinance is adopted at the same meeting as the estimate, although the *ad valorem* tax ordinance may not be adopted until after the expiration of thirty days.

Where, under the law, license may be imposed upon the retail liquor business, either for revenue or by way of police regulation, or for both purposes, the question as to what is the *main* purpose is one the solution of which depends upon the circumstances surrounding the imposition of the license. And where it is imposed by the same ordinance as the licenses for revenue, it would be a

LICENSE TAX—*Continued.*

strained construction of the law to single it out and hold it to be in the main a police regulation, and hence valid, and at the same time, to hold the others to be intended for revenue, and invalid, merely because the liquor license is higher, and the business of liquor selling is subjected to some restrictions not imposed upon other callings.

Swords, Sheriff and Ex Officio Tax Collector, vs. Daigle, 510.

LOCAL OPTION—

A resolution of a police jury, authorizing its president to employ counsel to enjoin a municipal corporation from selling intoxicating liquors during the year 1902, is held to be sufficient authority, without further action by the jury, for the president to institute suit and stand in judgment therein. If the people of a parish, by ballot, may vote liquor selling out of the parish, so that the prohibition is binding for twelve months on all the wards and cities and towns within the parish (and that is the law), such a vote taken throughout the parish every twelve months would continue prohibition in and throughout the parish indefinitely. It is only where a parish fails to act in the way of repetition of the edict of prohibition, within twelve months of its former election, or of the beginning of the prohibitive period, that a town or city can take action to emancipate itself from the restraint put upon it by the parochial election. Once a parish speaks for prohibition, its voice is paramount throughout its limits, binding on all, citizens and municipalities alike, and continues so for twelve months; and, if at or near the close of the twelve months it speaks again for prohibition, it silences any contrary voice which, meanwhile, may have been spoken in towns or cities within its limits.

Police Jury of Avoyelles vs. Mansura, 201.

If a parish holds an election to take the sense of the voters therein on the question of granting or withholding licenses to sell intoxicating liquors, and the vote is in favor of prohibition, it is binding upon the incorporated towns in the parish for twelve months; and if, before the twelve months expire, the parish holds another election, and the vote is again in favor of prohibition, it continues to bind the towns, notwithstanding the latter, meanwhile, may have voted in favor of liquor selling.

Parish of Avoyelles vs. Marksville, 215.

MANDAMUS—

The court will refuse a *mandamus* where there has been an unreasonable delay in applying for it. In the absence of special circumstances excusing the tardiness, twelve months, less a few days, will be held to be such unreasonable delay, in the case of a police captain who has been dismissed from the force after trial and conviction for one of the offenses specified by law as cause for dismissal, and who is applying to the courts for reinstatement, because of alleged nullities in the trial and conviction. Especially will this rule be enforced in a case where the applicant for *mandamus* has neglected to avail himself of his ordinary legal remedy of application for a new trial; and where the granting of the writ would bring disturbance to the finances of one of the branches of the public service. *State ex rel. McCabe vs. Police Board*, 162.

MARRIAGE—

In a suit for damages by the widow of the man killed, the answer of defendant specially denying plaintiff's capacity as widow, denying that she had ever been the dead man's wife, and averring that at the time of her marriage to him he was already married to her knowledge, sufficed to lay the basis for the introduction of proof of a former marriage. The law does not require marriage, like title to real estate, to be proved by documentary evidence. It may be proved by parol. Like other contracts, it may be proved by any species of evidence not prohibited by law, which does not presuppose a higher species of evidence within the power of the party. It appearing by affidavit filed here that a second woman, claiming to be the widow of the deceased, had, subsequent to the judgment herein, instituted suit for damages based on the same cause of action, and had filed with her petition a certificate showing a marriage with her prior in date to the other marriage, the cause will be remanded—it being held that the existence of the two widows to one husband, both claiming damages for his alleged negligent death, is such a vital question of fact as to justify the remanding to enable defendant to implead both in this suit and that they might contradictorily with one another establish which is the widow. *Albinest vs. R. R. Co.*, 133.

MORTGAGE—

To constitute the immobilization of movable property, it is essential that the ownership of the original immovable (plantation in this instance) and the movable placed upon it be vested in the same person. That fiction of the law which holds that a movable placed upon an immovable becomes immovable by destination does not destroy the vendor's privilege resting upon the former. A pre-existing indebtedness is sufficient consideration for the transfer of property. Where mules and agricultural implements belonging to the lessee or overseer of a plantation are seized and advertised for sale with the plantation, as immovables by destination thereon, and a private understanding is had by which the sale is permitted to take place, and the plantation and mules and implements are adjudicated to the seizing creditor, who in pursuance of the private understanding sells them as bought, taking the notes of the purchaser for the price with reserve of vendor's privilege and special mortgage to secure the payment of the notes, the notes being made to the order of the purchaser and by him endorsed in blank, the said lessee or overseer will be estopped from contesting the mortgage and vendor's privilege thus created on the mules and agricultural implements, as against a third person who has acquired the notes in good faith and in due course of business.

Bank vs. Planting and Refining Co., 650.

MUNICIPAL CORPORATIONS—

The town of Crowley is authorized to erect and maintain a public market-house, and has legal authority to enact reasonable ordinances requiring articles of food, intended for daily consumption, usually sold in town markets, to be vended at and in such market-house only, and to prescribe reasonable penalties in enforcement of such ordinances. That part of Section 33 of Act 136 of 1898 providing for the inscription of ordinances adopted by municipalities in a book kept for the purpose, is held to be *directory* merely.

Town of Crowley vs. Bucker, 213.

It is inadmissible that a political corporation exercising governmental functions should be dispossessed, by means of a tax suit against an individual, of a public work not upon private property, constructed at the common expense, for the protection of the lives

MUNICIPAL CORPORATIONS—*Continued.*

and property of its citizens. And it is a matter of no importance for the purposes of such a question whether, as between such corporation and other governmental authority, such work has, or has not, been properly located. *City vs. Fredericks*, 496.

The statute declaring that Police Juries and the constituted authorities of incorporated towns and cities shall not have power to contract any debt or pecuniary liability without providing in the ordinance creating the debt the means of its payment, is a prohibitory law, and such a limitation upon the power of Police Juries and municipal authorities that debts contracted in violation of its provisions are stricken with nullity and incapable of judicial enforcement. *Bank vs. Town of Jennings*, 547.

The question of the legality and constitutionality of a municipal ordinance, in the nature of a police regulation enforceable by fine and imprisonment, should be left to the court in, and to the occasion upon, which the attempt is made to enforce it, the remedy by appeal to this court being, in such case, open to the party as against whom the attempt is made. An injunction to restrain the enforcement of such an ordinance will not lie.

Bain vs. Town of Jennings, 410.

In a case to which a municipal corporation is a party and where the questions to be determined affect the police regulations of a community, some latitude will be allowed in the interest of the public, and where the corporation has failed to establish an important fact by reason of incompetent evidence, and it is apparent that competent evidence is obtainable, the case will be remanded.

Puehcu vs. Town of Jennings, 413.

Act 30 of 1877 prohibiting municipal corporations from incurring in any one year expenditures in excess of the revenues of the year, and requiring the revenues of each year to be devoted to the expenses of the year, and prohibiting municipal corporations from issuing evidences of indebtedness, precludes the city of New Orleans from entering into a contract by which the cost of paving a street is to be paid for out of the revenues of future years, and is to be settled for in the meantime by the issuance of interest-bear-

MUNICIPAL CORPORATIONS—*Continued.*

ing certificates. It makes no difference that the payments are to be made out of that part of these future revenues required by law to be reserved for public improvements; by being so reserved these revenues do not cease to be part of the revenues of the years in which they are collected, and as such required to be devoted to the expenses of those years. The case of *Railroad Company vs. Police Jury of Bienville*, 48th Ann., 331, distinguished.

State ex rel. Woulfe vs. Judge, 777.

MUNICIPAL LAW—

The ordinance adopted was a health ordinance. To maintain it an inspection of laundries was necessary. The reasonable fee imposed to pay the inspector for his services was properly charged to the defendant. The inspection was made for the benefit of the business itself, as well as in behalf of the public health. From the point of view sustained by the facts that it was compensation for services rendered, the ordinance is not unconstitutional on any of the grounds urged by defendant.

City of New Orleans vs. Sam Kee, 762.

OFFENSE AND QUASI-OFFENSE—

A purchaser of standing timber, whose good faith is otherwise established, will not be held to have been in bad faith simply because the records showed that the seller did not have title to the land. In order to be in good faith, a purchaser of timber is not obliged to investigate the authority of the firm he deals with, where such firm is reputable and is engaged in the business of buying and selling lands and timber both for itself and for others. A firm is liable for the tort of one of its members committed in the course of the partnership business and whereof the firm had the benefit. The individual members of a firm are liable for the tort of one of the members of the firm, although they had no knowledge thereof, where such tort was committed in the course of the partnership business and for the benefit of the partnership. Where a partnership advisedly sells the timber of a third person to an innocent purchaser, who cuts down the timber and takes it to market and sells it, both the partnership and the purchaser are

OFFENSE AND QUASI OFFENSE—*Continued.*

trespassers, and are solidarily liable in damages to the owner of the timber; but in fixing the amount of damages decreed to be paid by the parties, a different basis will be adopted; as to the innocent purchaser, the basis will be the value of the timber at the stump; as to the firm, held as a trespasser in bad faith, the basis will be the value of the timber after reaching market.

Trust and Safe Deposit Co. vs. Investment Co. et als., 251.

The violation by a person of the legal rights of another renders the latter liable for some damages, without proof of actual damage. Damages claimed from the president of a corporation by a stockholder for having refused to allow him to inspect the corporation books, where the officer has not acted in bad faith, must be those of which the refusal is the legal proximate cause, and of these due proof must be made; remote, uncertain, collateral and speculative damages cannot be recovered.

Bourdette vs. Sieward, 258.

A common carrier is bound to exercise the strictest diligence in receiving a passenger, conveying him to his destination, and setting him down safely, that the means of conveyance employed and the circumstances of the case will permit. There is a broad difference between the obligations of a carrier, to a passenger, and his obligations to a third person, complaining of tort; the burden of proof, in the latter case, save where otherwise provided by statute, resting upon the claimant, to establish both the injury and the negligence which caused it; whereas, in the former case, it is sufficient, in order to throw the burden of explanation on the carrier, for the passenger, suing on a contract for personal carriage, to establish the contract, and to show that he has not been safely set down at his destination. It is, then, for the carrier, and not the passenger, to show what negligence, and whose, prevented the fulfillment of the contractual obligations of the carrier. Where a girl takes passage on a steamboat and is drowned upon reaching the point at which she expected to leave the boat, in an attempt to transfer her to a skiff, the burden of proof rests on the carrier to show that such occurrence did not result from the fault of his officers or representatives. There is danger in attempting such transfer, at night, and whilst the boat is in motion, of which the

OFFENSE AND QUASI-OFFENSE—*Continued.*

carrier ought to be aware, and to which he has no right to subject an ignorant and inexperienced passenger, and, in so doing, he assumes the risk of the consequences. The damages recoverable by the surviving parents, for the loss by drowning of their daughter, a girl of sixteen, may include expenses incurred in finding and burying the body, loss of services and of filial offices, as also the amount which the daughter, herself, was entitled to recover, at the moment of her death. Where an action in damages is brought against the owner, and also the master, of a steamboat, and it appears that, in the transaction out of which the action arose, the master was acting in his representative capacity, the owner, alone, is liable. *Le Blanc and Wife vs. Sweet et al.*, 355.

While common carriers are not absolute insurers of their passengers, it is an implied condition of railroad companies with each passenger, that the latter shall not be put in jeopardy of life or limb by any fault—even the slightest of the servants of the company. The negligence of a common carrier includes its negligence in all the departments of its undertaking. The passenger is not relieved of all obligation as to his own safety, but, unlike the carrier, he need not exercise the highest degree of care. He is bound to exercise only ordinary care and prudence to preserve himself from injury. The standard by which to determine whether or not an adult passenger has failed to exercise the proper degree of care is whether a person of ordinary prudence in the same situation, and having the knowledge possessed by the passenger, would have done, or omitted to have done, the alleged negligent act. The passenger has the right to rely confidently on the care and watchfulness of the carrier to make all things safe for his transportation, with its incidents. A railroad company cannot be permitted to place a car on one of its tracks in the hands of parties who do not know or appreciate the danger of doing or not doing certain acts which it is the duty of the party having charge or control of the car, to know, and escape liability for his negligent acts on the ground that it was not under the control of its employees. It is responsible for the negligent acts of those in whose hands it permitted the car on its tracks to pass. It is negligence on the part of a railroad company to place a freight car, with opening

OFFENSE AND QUASI OFFENSE—*Continued.*

side doors, on a switch connecting with the main track, so near the junction that the door, when opened, would close the intervening space between the switch and the track. To leave open the door of a car so situated or to throw it open as a train is passing, is more than carelessness and passive negligence. It is an active violation of the company's contract, against which the passengers would have a right to anticipate full protection. Where the arm of a passenger was projecting from the sill of a car window, and was injured by being struck by the open side door of a freight car of the defendant company, left at rest upon a switch connecting with the main track, and so near that the open door closed the interval between the switch and the track, it is a question to be determined from the evidence under all the circumstances of the case, whether this was negligence on the part of the passenger—barring recovery. *Clerc vs. R. R. and S. S. Co.*, 370.

A street car, propelled by electricity and moving at a moderate speed, is run into at a corner by a covered beer wagon, the driver of which, occupying a seat from which his view upon either side is obstructed by the cover of the wagon, drives his mules at a brisk pace along the street which intersects the car tracks, and practically into the car, before looking up or down the track; *held*. upon the facts proven, the driver was at fault and the motorman is entitled to recover from the driver's employer for personal injuries resulting from the collision.

McCorkle vs. Brewing Ass'n, 461.

The employer is not responsible in damages to a workman or to his legal representatives for injuries suffered from a danger that was plain and open to view and easily avoided with ordinary care, and that the workman was well acquainted with. The risk of injury from such a danger is assumed by the workman as incident to his employment. *Merchant vs. Lumber Co.*, 463.

Where three defendants are sued for damages for false imprisonment and malicious prosecution, and the suit is dismissed as to two of them, who are police officers, on exception of no cause of action, it is the case against them *as presented by the petition* which must be considered in determining the correctness *vel non*

OFFENSE AND QUASI-OFFENSE—*Continued.*

of the judgment of dismissal—not the case as developed by the evidence on the trial of the merits as to the other defendant. If, *from the petition*, it appears that the officers of the law acted on probable cause in arresting the plaintiff, then no cause of action as to them is disclosed, and the judgment of dismissal must be sustained, notwithstanding on the trial of the merits, as to the other defendant, it develops such defendant did not instigate the arrest and the officers acted without probable cause. Those who honestly seek the enforcement of law and the administration of justice, and who are supported by circumstances sufficiently strong to warrant a cautious man in the belief that the party suspected may be guilty of the offense charged, should not be made unduly apprehensive that they will be held answerable in damages.

Lyon vs. Carroll, 471.

In an action for damages the testimony shows that the moulding machine is not considered a dangerous machine. While instructions should be given to all workmen in charge of machines, the extent of the instructions and the warning to be prudent, are to be gauged by the necessity because of danger. The *onus* of proof is with the plaintiff. The foreman swore that he did not put plaintiff in charge of the machine. The workman who had charge of the machine just previous to the accident, and who gave up his charge to the plaintiff, swore that before leaving this machine, he gave full instructions to the plaintiff. All the witnesses, save plaintiff, testify that it was a matter of physical impossibility for the accident to have happened in the way alleged in plaintiff's petition and as he claims. The witnesses swore that the wooden strip, while being worked through the moulder, will never jerk back into it and throw the hand in the interior of the moulder into the blades of the lower cylinder. *Russell vs. Allen & Currey*, 514.

Where a boy of thirteen walks from one side of a street, on which there are double car tracks, towards the other side, at night, and, without stopping, collides with a car, blazing with light, loaded with passengers, and moving at the rate of six miles per hour, which there was nothing to prevent his seeing and hearing, there can be no recovery from injury resulting from such collision.

Kaiser, etc., vs. Railroad Co., 539.

OFFENSE AND QUASI OFFENSE—*Continued.*

It is a general rule that a person who by his fault causes damages to another, whether by his act, or by his negligence, his imprudence or want of skill, is obliged to repair it. Citizens are protected by the Constitution from warrants of arrest for crime issued against them, without probable cause, and they are entitled to recover damages from parties causing such warrants to issue. It is not necessary for such recovery that the arrest should have been actuated by malice, in the sense of personal ill-will towards, or desire to injure the party charged. The absence of such malice only affects the character and *quantum* of damages. Advice of counsel in certain cases under certain circumstances gives a qualified protection to their clients in cases of *torts*, but not to the extent of enabling them to escape liability, though client and counsel are negligent or indifferent to consequences.

Lange vs. Railroad Co. 687.

The master is not bound, absolutely, to his servants for the competency of their fellow servants, engaged in the same common employment, and is guilty of a fault and becomes liable to the servant injured, only when the fellow servant, through whose incompetency, or negligence, the injury is inflicted, has been employed, or retained, with knowledge of his unfitness, or when the master has failed to exercise reasonable diligence and care to inform himself, and keep himself informed, as to his qualifications. Hence, a mere allegation of injury, caused by the incompetency, or negligence, of a fellow servant, imputes no fault to the master, and discloses no cause of action against him, and an exception to that effect should be decided before trial, if a decision is requested, and not referred to the merits. Hence, also, it is error to charge the jury that the "general allegation that the damage was caused by the employe is sufficient notice to the defendant that he knew of the incompetency of the employe." Where, however, in such a case, the exception of "no cause of action" is referred to the merits, by the court, and, upon the trial on the merits, the defendant, without objection, permits evidence to be introduced tending to establish facts which, if alleged, would have disclosed a cause of action, he allows the ground upon which his exception is based to be taken from under it and, thereby, in effect, allows the petition

OFFENSE AND QUASI OFFENSE—*Continued.*

to be amended and its defects cured. Whilst the doctrine of the non-liability of the master for injury sustained by a servant in his employ, through the incompetency or negligence of another servant employed by him, has not been recognized in this State as including certain classes of cases to which it has been applied by the English, and by, some, American, courts, the ordinary case of a brakeman injured through the incompetency or negligence of an engineer, when both are engaged in handling the same train, in the service of the same employer, is one to which, under our jurisprudence, as well as the jurisprudence elsewhere, that doctrine is properly applicable. Both reason and authority sustain the proposition that where the work for which the servant is employed is such as to involve risk to the lives and persons of others the master is required, upon engaging such servant, to make reasonable investigation into his character, skill and habits of life. And, where a company, operating a railway, employs a person as engineer and assigns him to the duty of running a locomotive, without requiring him to produce credentials of any kind, without inquiry, except such as is made of the person, himself, as to his competency for the discharge of that duty, and with no knowledge of him, save that derived from his having worked for it as a steam and water fitter, and machinist, such company is guilty of negligence, and is liable for injury resulting to a fellow servant from the incompetency or negligence of such engineer. The general rule, no doubt, is, that, where a servant is aware of the incompetency of a fellow servant and, nevertheless, accepts employment and works with him, without objection or notice to the common master, he thereby accepts the risk, so far as the master is concerned, of such incompetency. In the instant case, however, whilst it appears that the plaintiff, a brakeman, by reason of a limited experience in switching cars, upon the day of the accident, concluded that the engineer, who had been assigned to duty for the first time did not know how to handle the engine it also appears that, when the train was taken out, shortly after such switching, the superintendent of the road went on the engine and the engineer, thereafter, acted under his orders, or in his immediate presence, or both. It is, therefore, held that, notwithstanding the opinion, or limited knowledge, of

OFFENSE AND QUASI-OFFENSE—*Continued.*

the brakeman, he had the right to assume that the company, itself, thus present, through its superintendent, would see that the duties of the engineer were properly discharged. Where a train is made up of skeleton (log) cars, the footing upon which is precarious, it is negligence for the engineer to reverse his engine without warning, since he thereby subjects the brakeman, taken unawares, to the danger of being thrown off. The plaintiff in this case lost a leg. He has been awarded, by the verdict and judgment appealed from, the sum of \$10,000. This amount is reduced to \$6000.

Bell vs. Lumber Co., 726.

OFFICE AND OFFICER—

In the absence of either express grant, or of express or implied limitation, of authority, a municipal corporation, as ordinarily constituted, possesses the incidental power, *for cause*, to remove corporate officers, whether elected by it or by the people. If an officer has no franchise in his office—that is to say, if the nature of his office is a mere employment, he may be removed without notice, subject to the liability of the corporation for damages for breach of contract, if, by such removal, a contract is violated. But, where there is a franchise in the office, resulting from an election, or appointment, for a term fixed by law, there must be a charge against the officer to be removed, stated with substantial certainty; notice must be given of the time and place fixed for the hearing; reasonable opportunity must be afforded to defend, in person or by counsel; and, where the charge is insufficient, if proved, to justify the motion, or where, being sufficient, there is no evidence to sustain it, the officer is entitled to a *mandamus* to restore him. The rule as thus stated is subject to the exception, that notice may be dispensed with, (1) when the officer appears and answers, (2) when he has permanently left the municipality, (3) in certain cases where it is apparent that the motion was for good cause and that the order to restore would be without practical and useful effect. The power of motion conferred upon the city of New Orleans by section 12 of its charter is neither greater nor less than the city would have had if that instrument had been silent upon the subject, the effect of the grant, as contained in the

OFFICE AND OFFICER—*Continued.*

charter, being merely to set at rest any doubt which might have existed if the matter had been left to implication. The authority conferred upon the council to "expel one of its members by a two-thirds vote of all the members elected to such council, five days' notice and an opportunity of being heard in his defense having previously been given such member," presupposes a *charge* sufficiently grave to justify expulsion, for the hearing of which time and place are fixed; for, if there be no such charge and no time and place fixed for the hearing there can be no defense and nothing of which to give notice. Whether the charge is sufficient, if proved, is for the ultimate determination of the courts; but, where the notice and the opportunity to defend have been given, and evidence has been adduced in support of the charge, the courts will not, ordinarily, go behind the judgment for the purpose of inquiring "into the amount of the balance of evidence." A statement, made in confidence by a member of the New Orleans city council to the mayor that he had heard rumors reflecting upon the official integrity of the other members of the council, is a privileged communication, and furnishes no ground for the expulsion of the member making it, even though the informants upon whom he relies fail to substantiate his statement. The courts are disinclined to hold the speaking of slanderous words a ground for removal from a public office. Where it appears that a charge for which a member of the New Orleans city council was expelled was not formulated or made known to him with substantial certainty, and that he objected to being tried on that ground; that his demand to be allowed the assistance of an attorney was ignored, or denied, whilst able counsel conducted his prosecution; and that he was so expelled after a trial in which he was without witnesses, wholly unprepared, and wholly incompetent to cope with the professional ability arrayed against him, he will be restored to his office by *mandamus*, upon timely application.

State ex rel. McMahon vs. City, 632.

PLEADING AND PRACTICE—

An order of court directing a party to the suit to set out his claim more specifically will not be reversed unless it is manifest that error has been committed. It is not unreasonable to require

PLEADING AND PRACTICE—*Continued.*

of the pleader, who sues on a contract, to disclose whether he sues on a written contract or on a verbal contract. Facts essential to sustain the suit should be stated. A plaintiff is not entitled, as a matter of right, to an examination of defendant's books and papers to an extent requisite to enable him to make sufficient allegations to sustain his actions. His ground of attack should be sufficiently explicit to enable him to compel his adversary to produce needful books and papers on the trial. Agreement of counsel, subject to different constructions, will not be taken in the presence of a disagreement as to the extent it was intended to include.

Lombard vs. Bank, 183.

POLICE JURY—

Taxpayers of a parish have a right to implead the Police Jury and call in question the legality or constitutionality of any act or ordinance of that body. Act No. 24 of 1870, which prohibits Police Juries from making appropriations for, or authorizing expenditures upon, public roads until provision for meeting the same shall have been made by laying a *special tax* on all the real and personal property in the parish, and which declares that payment for work performed or material furnished for constructing or repairing roads shall not be made from any other fund or funds of the parish, is distinctly modified, if not repealed, by Art. 291 of the Constitution of 1898, which authorizes Police Juries to set aside at least one mill of the annual parish tax for roads and bridges.

Hudson et al. vs. Police Jury, 387.

PRIVILEGE—

The purchaser of a growing crop being charged with presumptive knowledge of the existence of the privilege of the furnisher of supplies resting upon it, allegations of his having had actual knowledge of such privilege are unnecessary and surplusage, and the disproof of such allegations does not affect the case one way or another. If the petition in the case contained a cause of action previous to such disproof, it still does so. A debt "for money and necessary supplies to make the crop" is privileged on the crop.

Weill & Co. vs. Kent, 322.

PROMISE OF SALE—

Defendant had written to a real estate agent informing him of his willingness to sell a tract of land at a stated price. Two years afterward, without communicating with defendant, and when it was apprehended by this agent, who informed plaintiff that there was reason to infer that he, defendant, would not accept the price offered, the agent undertook to sell the property and bind the defendant, although he had not been specially authorized to sell the property. When defendant received the letter informing him of the action of the real estate agent, he did not approve or decline. Shortly afterward it became known from defendant that he was not willing to sell at the price offered. Plaintiff had not deposited the whole amount of the price. He withdrew the amount deposited, which was less than the price, and plaintiff afterward sought to buy other lands. Having failed in the second attempt at buying lands, he sought to hold the defendant in damages. This claim for damages is too speculative and uncertain to serve as a valid basis for a judgment, besides plaintiff never acquired a title to the land. The fee of the curator, appointed to represent defendant in the attachment proceedings as fixed by the district judge, is not too large, and under a special statute the curator's fee may be increased to an amount corresponding with the value of the services.

Watt vs. Williams, 506.

PUBLIC LANDS—

Bayou LaChute has its source and runs its course in the Parish of Plaquemines, and is not a navigable stream in any sense that places it beyond the dominion and control of the State of Louisiana. Hence, *quoad* a mere squatter, upon land owned by the State, and fronting on said bayou, it is competent for the State to make a "cut-off," connecting said bayou with other waters; and it is equally competent for the State to recognize or tolerate such "cut-off" when made by other persons. And so, when a "cut-off" has been made and the State thereafter leases its lands upon the bayou to persons, otherwise "squatters," who have full knowledge of its existence, and the one lessee makes no stipulation concerning it, whilst the other takes a lease of the "cut-off" itself, for the planting and cultivation of oysters, the one lessee has no right to close such "cut-off" to the injury of the other, even though he may

PUBLIC LANDS—*Continued.*

find it prejudicial to the oyster beds upon the property leased by him. The damages to be allowed for an alleged trespass must be established with reasonable certainty, and will not include traveling expenses, loss of time or attorney's fees incurred for the purposes of prosecutions instigated against the trespasser by the party claiming. And, where the punishment of the trespasser has been submitted to and acted on by or is pending in the Criminal Court, the Civil Courts will be slow to inflict punitive damages.

Bendich et als. vs. Scobel et als., 242.

RAILROAD COMMISSION—

The provision of Article 285 of the Constitution, conferring upon this court jurisdiction of suits brought against the Railroad Commission to test the validity of whatever rule, regulation, etc., it may have adopted, cannot be made to apply to suits brought by the Railroad Commission to recover the amount of fines imposed by itself for violations of its ordinances. A suit of the latter kind is an ordinary suit falling within the general rule as to jurisdiction.

Railroad Com'n vs. R'y Co., 450.

RECEIVER—

The management of the company brought it within the terms of the Statute 159 of 1898. A receiver was appointed by the District Court, and the court's action in this respect is affirmed, subject to the rights of creditors under Section 10 of Statute 159 of 1898. It is good ground for the appointment of a receiver to a corporation when it appears that the directors or other officials are jeopardizing the rights of stockholders, or creditors, by grossly mismanaging the business, or by committing acts *ultra vires*, or by wasting, misusing or misapplying the property or funds of the corporation; or, when it appears that a majority of the shareholders are violating the charter rights of the minority and putting their interests in imminent danger. It is for the court to determine whether or not the showing made justifies and makes advisable the appointment of a receiver. The appropriate place for officials in charge of the business of a corporation is the domicile of the company. If they live away from its domicile, they

RECEIVER—*Continued.*

have no right to charge the company for traveling expenses to and fro between their homes and the domicil of the company. Officials and majority shareholders have no right to extend favors to certain of the shareholders at the expense of the corporation, or of the body of the shareholders. The provision of the charter requiring *thirty days'* previous notice to be given to stockholders of a meeting called to consider the question of the dissolution and liquidation of the corporation is held to be mandatory. It will not do to say that because a corporation may be insolvent and nothing be eventually coming to the stockholders, they are without interest to take action to prevent abuses. Where a case for a receivership is otherwise made out, it is no sufficient ground for denying the application that it will entail large costs and expenses. The courts of Louisiana will not permit the spoliation of estates and corporations in the way of the allowance of exorbitant charges for commissions, fees, costs, etc.

Davies et als vs. Water and Light Co., 145.

In probate proceedings all evidence in support of a judgment must appear of record; and in this respect insolvency proceedings are assimilated to probate proceedings. Hence, a judgment homologating the quarterly statements or the final account of a receiver will be set aside on appeal, unless supported by evidence of record. *Ex parte* affidavits are not evidence. Act 159 of 1898 is imperative against the approving of the quarterly statement of a receiver until ten days after notice of the filing of such statement shall have been entered in the receivership order book, a book which, under provision of the same act, must be kept by the clerk of court; hence, a judgment approving a receiver's quarterly statement, without such entry having been made, must be set aside. The law providing for the fixing of the fees of receivers is Act 159 of 1898. Where the receivership is of a going concern, the fees are the same as those of syndics under Section 1818 of the Revised Statutes. Where the receivership is not of a going concern, the fees are fixed by the judge at his discretion. The law fixing the fees of auctioneers is Act 104 of 1896. By this law these fees are fixed as follows: On sales of immovables, two per cent. on the first ten thousand dollars of the price and one per cent. on the excess; on sales of movables, not more than five per cent. of the price, at the

RECEIVER—*Continued.*

discretion of the court. Where the immovables and the movables are not sold separately, but in block, the appraisement of the property must be taken for basis of computation. A pledgee of bonds authorized by the act of pledge to sell the bonds, with or without notice, at public or private sale, and at such sale to become the purchaser, may thus sell the bonds and become the purchaser of them. In this case the bonds were sold after full notice and at a fair price. Where the immovables and the movables of an insolvency are sold confusedly in block, and the property thus sold was affected by mortgages and privileges, the court will apportion the price equitably among the mortgage and privilege creditors. In this case the appraisement of the property is adopted as the basis of the apportionment. Where receivers permit the purchaser at the judicial sale of the immovable property of the estate to pay the price of the sale direct to a creditor holding a mortgage on said property, they do so without right and at their peril; and in the settlement of the estate the said price will be dealt with as if collected by the receivers. Where a case on homologation of final tableau is fixed for trial before the expiration of the ten days' public notice of the filing of the tableau, and after said fixing an opposition is filed, the fixing will not be binding on the opponent unless he is notified thereof by posting as required by rule of court. But, where such fixing was for the 28th of September, and on that day the trial is postponed to the 15th of October, and is again postponed to the 29th of October, and the attorney for the opponent is present at the latter postponement and verbally consents thereto, the said opponent cannot, at the calling of the case on the 29th of October, claim a continuance because of his having not been notified by posting, or because his former attorney no longer represents him, and his new attorney has but a few days before come into the case. Continuances are necessarily in great measure within the discretion of the trial judge.

Barry Bros. et als. vs. White Lead and Color Works, 236.

ROAD-BED—

The difference between plaintiff and defendant grows out of the measurement of defendant's "road-bed" in order to fix proportion of cost of paving due by defendant to plaintiff. The statute looks

ROAD-BED—*Continued.*

only to the "road-bed" in fixing the amount. Plaintiff's contention is that this "road-bed" is seven feet wide, the defendant's that it is less. When ties are used, the rail rests on the inside and outside of the track the length of the ties. When girders or sleepers are used, the width of the "road-bed" is less. The "road-bed" consists of the foundation on which the superstructure rests. The rails are the superstructure and rest on the girders. The proportion of the space being limited to the "road-bed," the court holds that it is without authority to take the outside of the track into account on the ground that the road is benefited by the adjacent pavement. "Road-bed" owes the proportion of cost of paving. This does not include part of the adjacent roadway on which rails do not rest.

City of Shreveport vs. Belt Railway Co., 785.

SALE—

The purchaser of real estate bought by a married woman in her own name and evidently with her paraphernal funds is without good ground to urge that the property was a community asset in the presence of the fact that the testimony establishes that it was not. A title to immovable property formerly bought by a woman whose name in the act is preceded by the letters "Mrs." and subsequently sold by her in an act wherein nothing leads to the inference that she was married, and in view of the fact that other testimony amply sustains the contention that she was not married, is unquestionably good and valid. Moreover, the title falls within the grasp of the statute of prescription of ten years during which owners have been in possession without any adverse claim urged to the property by any one. It can be safely decreed that the purchaser is tendered a title which he must accept.

Revol vs. Stroudback & Stern et al., 295.

Where an act, purporting to be a sale of real estate, and a counter letter confirmatory of said act and according to the vendor the right to redeem the property within a time fixed, are annexed to, and made part of, a petition in which it is alleged that the transaction was intended merely to secure a loan, and it is not alleged that the money necessary to redeem the property was paid or tendered within the time allowed, or that the property was worth less

SALE—*Continued.*

at the date of the transaction than the amount received by the vendor, or that the vendor remained in possession, an exception of no cause of action is properly sustained to a demand that the vendor be decreed the owner of the property and restored to possession on payment of the amount received by him with interest.

Bagley vs. Bourque, 395.

In a contract of sale it is essential that the price be certain—fixed and determined between the parties. So, too, a fixed price is of the essence of the contract of *dation en paiement*. While the validity of a sale of *dation* does not depend on a price being fixed with certainty *in the act*, it does depend on a certain price having been agreed upon by the parties, or left to the arbitration of a third person who fixes it. And a transfer in writing of real estate, attacked, must be held null, either as a sale or a *dation*, if it be not shown that it was made for a price that was agreed on. While it is true that the rules peculiar to donations *inter vivos* do not apply to *remunerative* donations, this is not without exception. For instance, where the value of the object given exceeds by one-half the amount of the charges, or the value of the services, it is necessary the act of donation should, like gratuitous donations, be passed before a notary and two witnesses. Judgment appealed from amended and affirmed.

Pulford, Tutor, vs. Dimmick et al., 403.

Tracts of land were sold by defendant to plaintiffs and each tract, except one, was sold as containing a stated number of acres. The vendor, when the parties met to complete the deed, swore that he said to the vendees that he was not prepared to give correct descriptions of the land and that vendees requested him to complete the deed by describing the tracts as correctly as possible. This was contradicted. The vendor sold all the land he owned in the locality named. The vendees claim that there is a deficiency and

sue for a diminution of the price. There is deficiency in the number of acres in the tracts named, but there is no deficiency if all the lands in the locality, not designated by the names and the number of acres, is taken into account. *Held*—That in making up the total number of acres sold, defendant is entitled to include

SALE—*Continued.*

the acres not described with those described. All the tracts were of about equal value per acre and the nature of the land about the same. *Mount vs. Harrell*, 480.

Where "A" is the owner of real estate, by undisputed title, and sells the same to "B," who fails to record his title, the judgment creditors of "A," can acquire judicial mortgages on such property by recording their judgments after the date of such sale and before its registry. And, in such case, the judicial mortgages recorded against "A," prior to the registry of the sale, prime all such mortgages recorded against "B," whether the latter be recorded before or after the former. *Baker vs. Atkins & Wideman et als.*, 490.

Where all the essential elements and conditions for an absolute sale are present, in a contract between parties, the effects flowing legally from that particular contract follow, whether the parties foresaw and intended them or not, and though they may refer to the contract as an agreement to sell or as a conditional sale. Where machinery has been sold to a planter which he has immobilized by attaching it to his plantation and the property to which the same was attached was permitted to be seized and sold without opposition of any kind in enforcement of a pre-existing mortgage, the seller cannot, after the sale as against the purchaser, recover the machinery under a claim of ownership.

Machine Co. vs. Newman, 702.

The objection to an acceptance of title raised by an adjudicatee of property sold under a judgment of partition that one of the joint owners of the property had not been made a party to the partition proceedings, will not be sustained where the evidence shows that the interest which is alleged to have been not represented was that of a presumptive heir in a succession opened in 1877, and whose existence was then unknown and continues still to be unknown. Under such circumstances a partition sale made contradictorily with the co-heirs of the absentee, under decree of court, will protect the purchaser. *Martinez vs. Wall et als.*, 737.

A suit brought by the seized debtor, or his assignee, against the purchaser at a judicial sale to annul the sale, is not a petitory action, though plaintiff prays, as a consequence of a judgment in

SALE—*Continued.*

his favor, that he be decreed to be the owner of the property and placed in possession. There is no necessity for the petition in such a suit to specifically describe the property purchased, when allegations as to the suit and the sale fix, unmistakably, its identity. There is no necessity for such an assignment to be by authentic act, nor as against the purchaser at the sale to have been recorded. In a suit brought upon an assignment of a right of action evidenced by a writing in which the assignment is declared to have been made for "value received," defendant cannot urge, upon an exception of no cause of action, that the instrument should have specifically set forth what the actual consideration was, and set forth all the details of the transaction. It is *prima facie* valid. Defendant is without legal interest to inquire into the precise character of the transfer, unless he can allege and show injury. All he can exact is full defense and protection.

Viguerie vs. Hall et als., 767.

SCHOOL DISTRICT—

In considering the question of whether compliance with section 11 of Act 81 of 1888 requiring school boards to divide their parishes into school districts, was sufficiently formal, regard must be had to the connection in which the question is mooted, whether in connection with the mere distribution of school funds, or in connection with the exercise of the taxing power, a much less strict compliance being sufficient in the former than in the latter case. Residents of a school district who do not show that their own children are incommoded, or that their taxes are increased, by the manner in which the boundaries of a school district have been fixed, are without interest and therefore without right to resist a tax levied in the district, on the ground that the boundaries have not been so fixed as to accommodate the children of the parish.

Burnham et als. vs. Police Jury of Claiborne Parish. 513.

SEPARATION FROM BED AND BOARD—

To warrant in Louisiana a judgment of separation from bed and board between married persons, the grounds assigned and proved must be of a very serious character. Light differences between the spouses will not suffice.

Pozo, Wife, vs. Connor, Husband. 453.

SEPARATION FROM BED AND BOARD—*Continued.*

A husband may be guilty of outrages towards his wife of character such as to render their living together insupportable without raising his hand against her—his conduct may be the very refinement of cruelty without either force or blows.

Olberding, Wife, vs. Gohres, Husband, 715.

SHERIFF—

The sheriff has a standing in court in a proceeding against an adjudicatee to set aside an adjudication because of non-payment of the amount of the bid. Such proceeding may be by rule. Where, by the certificate of mortgages read at the sale, there appears to be outstanding special mortgages resting on the property sold, the adjudicatee, after paying to the sheriff the amount of the writ and costs, may retain in his hands, to satisfy said outstanding mortgages, the surplus of the purchase price. The nullity resulting from the sheriff's failure to announce that the adjudicatee shall have the right to retain in his hands the surplus of the purchase price, as stated in number 3, is relative, and the sheriff is without interest and without standing to invoke the same. And, even if the sheriff had such standing, he could not be permitted to urge such nullity in the present proceeding, which is based on the theory of there having been a valid sale of which the adjudicatee has failed to pay the price.

Ash vs. Chemical and Fertilizing Co., 311.

SUBROGATION—

A creditor who, by making a partial payment to another holding a prior special mortgage on certain property, has become legally subrogated *pro tanto* to the rights of the latter, is subrogated subordinately to the rights of that creditor to be paid the balance of his debt. A legal subrogation to rights by payment is derived from "the law" not from the consent of the party who receives payment. The fact that the creditor who has received the payment has written the words "paid" or "cancelled" upon the particular mortgage note for which he has received payment, does not prevent legal subrogation taking place in favor of the person making the payment, if he be otherwise entitled to it. Other creditors cannot

SUBROGATION—*Continued.*

urge such fact in their own favor when the mortgage remains uncanceled upon the record. The law does not take note of the origin of the moneys with which a payment is made which carries legal subrogation with it as its effect; legal subrogation takes place though the payment be made by money borrowed by the party making the payment or furnished to him by another person for that purpose. A third possessor who pays off special mortgages existing on property at the time of its acquisition, becomes thereby legally subrogated to the rights of the mortgagee who has been paid and the subrogation is not lost because the third possessor may be subsequently evicted. The character and effect of the payment which attached to it when made remain unaffected. A prior mortgage creditor who intervenes by third opposition under a sale made by a junior creditor and claims the proceeds of sale by preference, consents thereby to a transfer of his mortgage rights from the property to the proceeds sale in the hands of the sheriff and he cannot claim that, under Art. 684 of the Code of Practice, the price bid was insufficient to carry the title and entitle the purchaser to a deed. The wife had paraphernal interests to protect. She obtained a judgment of separation of property. The *dation* to her by her husband was annulled. She, none the less, retained the administration of her separate interest, as the judgment of separation was not null in so far as it dissolved the community and gave her the right to manage her separate interests. She became the owner of a separate interest in property owned by her husband (she was his creditor) and for that reason had the right to pay a debt against him and to legal subrogation, provided it did not come in conflict with the transferor's mortgage, who retained, under the rule which controls legal subrogation, all his rights on notes unpaid in his hands. The owner has an interest that his property be sold for an amount sufficient to pay mortgages in rank superior to those of the seizing creditor. The sale is null if made for less than the amount of the mortgage first in rank.

Walmsley & Co., in Liq'n, vs. Theus et al., 417.

SUCCESSION—

An heir who asks to be recognized as an heir and to be placed in possession of a succession, to the extent of his interest, has a

SUCCESSION—*Continued.*

right of action. As to this heir, the will of the *de cuius* not having been legally probated, he may be heard to have all the proceedings leading to the judgment probating the will, as well as the judgment itself, decreed null. The proceedings and judgment probating the will are null, and the judgment appealed from is affirmed.

Duperier vs. Bervard, 91.

An administrator making the heirs parties, has capacity to institute and prosecute a suit for a partition of property owned in indivision by the succession he represents and third persons. The heirs of a predeceased husband and father, who died without debts, are *third persons quoad* the succession of the lately deceased widow and mother which is under administration to pay debts contracted by her individually after the death of the husband. A succession under administration, and unaccepted as yet by the heirs of the deceased, is held and considered a separate entity distinct from *their heirship*, which, until the succession is settled, or their acceptance avowed, is contingent and remote, in the sense that there devolves upon them *as heirs only* the remainder left after payment of the debts.

Wilson vs. Wilson et als., 139.

Books kept under the control and direction of a co-executor by a book-keeper in the employ of the succession, are admissible as a commencement of proof. The preponderance of the testimony shows that the amount charged against the co-executor was correctly charged and that the amount was due.

Succession of Magi, 208.

The main contentions of the widow, who opposes the final account of the administrator, that a certain balance of indebtedness is due her and that certain property and credits are placed on the account as pertaining to the separate estate of the husband when the same is community in character, having been negatived by the evidence and denied by the court, the case will not be remanded because of inconsequential errors of debit and credit in the account when it appears certain that it would avail her nothing to so remand and would only result in a useless accumulation of costs.

Succession of Hewitt, 446.

SUCCESSION—*Continued.*

In the publication of the ten days' notice of the filing of the tableau of the administrator of a succession, neither the first nor the last day of the publication can count; and this notice being essential, a judgment of homologation of such an account entered up on the twelfth of the month, where the first publication was on the second of the month, will be set aside.

Succ'n of Miller, 561.

This case involves only questions of fact.

Succ'n of Haley, 571.

A person without pecuniary interest in a succession is without standing to oppose the appointment of an administrator.

Succ'n of Williams, 610.

The administratrix had authority to employ an attorney to defend a suit brought against the succession she represented. The amount of the fee is fixed and the privilege for its collection is recognized. All the parties admitted that the fee of the notary contested was due in such a manner as to lead to the unavoidable conclusion that it was admitted as carried on the account of the administratrix. "Provisions" to be secured by a privilege must consist of supplies made to the debtor or his family by retail dealers of provisions during the last six months. A receipt showing payment in full of a judgment against a succession and subrogating the one by whom it was paid creates a *prima facie* presumption of a right which was not rebutted. A claim for the reimbursement of amounts which were entirely in the nature of a personal obligation of the debtor is only subject to the prescription of ten years. Facts and corroborating circumstances with the testimony of one witness sustain the claim of one of the creditors of the succession. An account, after the legal delays, may be homologated so far as not opposed, and the amounts claimed limited to the oppositions filed. Cross on Successions, p. 480. The administratrix having acknowledged the claim of a creditor carried on her account, to the correctness of which she swore, and other corroborating circumstances and the evidence of one witness, were sufficient to sustain a claim for more than \$500.00. An annuity was originally rightly credited and the judgment is amended only to the extent necessary to reinstate the

SUCCESSION—*Continued.*

claim, as that is all that is claimed under the pleadings. Books of amounts received may be taken as proof against him who has written them. The administratrix, in settling with one of the creditors, under the circumstances of this case, may invoke compensation against his claim, in case it appears that he owes the succession.

Succession of Moise, 718.

SUCCESSION SALE—

A party who has entered upon and is in undisturbed possession of land purchased by him, occupies a different position from what he would if he had not yet taken title or possession and was being proceeded against to compel him to do so. A purchaser of land who is in undisturbed possession thereof cannot enjoin executory proceedings issued to enforce payment of the purchase price, on the ground that he acquired no title to his purchase. He cannot hold the property and possession thereof under the title, and prevent the vendor from being paid through sale of the property. A probate sale expressly made upon the petition of tutrix acting as administratrix of a succession to pay the purchase price of property due in its entirety by the succession and secured by special mortgage and vendor's privilege on the property sold, conveys title to the purchaser, though the sale was not made upon the recommendation of a family meeting in behalf of the minor—heir of the deceased father. Property ordered to be sold for cash and advertised and sold for cash, is not less a cash sale because after the sale the purchaser, by reason of special facts, does not pay the cash. A probate sale of community property in the succession of a father to pay a community debt secured by special mortgage and vendor's privilege upon it, conveys the property to the purchaser thereof free from mortgages standing upon it in the name of the deceased. Community creditors are to be paid by preference and priority out of the proceeds of the sale of community property, over the individual creditors of either of the spouses. The mortgage rights of minors upon the property of their natural tutrix, upon community property, are not greater than the rights of the mother herself in that community, and that interest is limited to the residuum after payment of the community debts. (Heirs of

SUCCESSION SALE—*Continued.*

Baillio vs. Poisset, 8 N. S. 336.) The minor heirs of a father, to whom the mother has been confirmed natural tutrix, cannot enforce the general mortgage which the law gives them against her as tutrix upon her interest in specific community property, which has been sold in the succession of the father to pay a community debt secured by vendor's privilege. The sale extinguishes any right which the wife had in it. The purchaser, at such probate sale, has no legal ground for fearing disturbance from such a mortgage, particularly when aware of the situation at the time of the purchase. The taking by a natural tutrix of the legal right to certain property does not, of necessity, cause that property to be affected by a general mortgage in favor of her minor children. (*Succession of Manson*, 51st Ann. 130.)

Childs vs. Sheriff et als., 270.

TAXATION—

All property is liable to taxation unless shown to be within some exemption established by law. Hence, in a proceeding to annul an assessment, the exemption relied on must be affirmatively established. Property, liable to taxation, which is entered upon the assessment rolls as "exempt," and which is not assessed, is "omitted" from the assessment as effectually as if it were not entered at all, and is, therefore, within the meaning of the law providing for the assessment of property which has been "omitted." Taxes for the current year are not included in the term "back taxes" as used in Sec. 12, Act 170 of 1898, providing that "no back taxes for more than three years shall be assessed," hence, taxes may be assessed for three years preceding that in which the assessment is made. Nor, does it affect the question that the supplemental tax roll is not recorded or the notices of assessment given until the following year. A suit, the purpose of which is to relieve property of the taxes assessed against it for one, or more, years, is a proceeding "for the reduction of assessments" within the meaning of the law providing that in such cases the attorney of the tax collector shall be compensated by receiving ten per cent, on the amount collected.

Church, etc., vs. City, 611.

The General Assembly has the constitutional right to fix a period beyond which actions attacking the legality and regularity of

TAXATION—*Continued.*

special elections held under the provisions of Articles 281 and 232 of the Constitution shall be barred. Section 17 of Act No. 5 of 1899 has not been repealed by either Act No. 12 or Act No. 114 of 1900. It is not necessary at a special election held under Articles Nos. 281 and 232 of the Constitution seeking to obtain from the property taxpayers of a town, authority in municipal authorities to incur a debt for designated purposes, and to secure payment of the same by the levy of a special tax, that the debt to be incurred for each particular purpose should be specially set out. Application of the tax funds in detail inside of the purposes for which they were authorized, is left to be controlled by the discretion of the authorities. Should the municipal authorities attempt to apply the special tax to the payment of debts created anterior to the authorization granted them, or for debts incurred for purposes not authorized by the Constitution, the same may be prevented by the remedy of injunction. Under authority granted by the taxpayers of a town, to incur debt, to the municipal authorities thereof, and to issue bonds to represent same, and to secure the debt and bonds by a special tax, the authorities may, without issuing bonds at all, create a debt for the purposes stated, and levy a special tax within the constitutional limit, if it be more advantageous and advisable to do so. The bond issue is authorized merely in aid of raising the money needed for the purposes stated. When the property taxpayers of a town at a special election have authorized the town authorities to incur a debt of ten thousand dollars, and interest, and authorized the levying of a special tax of five mills for ten years on the valuation and assessment fixed by the Constitution, the authorization is null and void in so far as the debt and interest authorized to be incurred exceeds the special tax which is authorized to be levied to pay the debt and interest. Each year's instalment of debt and interest must correspond with that year's special tax. The authorization granted is not void in its entirety, but debts and interest incurred under it must be scaled or pruned down.

Gray vs. Tax Collector, 672.

TAXES—

City taxes are imprescriptible, but the privileges securing them are prescribed by three years. When the privileges are prescribed, taxes become mere personal claims against the tax debtor and are of no effect against mortgage creditors. The character of tax debtor results from the operation of law and not from the convention of individuals, and the party assessed is, in law, the tax debtor. The assumption in an act of sale of a city tax is not a *stipulation pour autrui* for the benefit of the city, but is a matter purely personal to the contracting parties and forming part of the consideration of their contract. A claim asserted by the city, not by virtue of any inherent or statutory governmental power, but as one arising under the Code from the stipulation of a private contract, will be tested by the same law as would govern between individuals. As the assumption neither impaired the city's right to enforce its tax in the manner and within the time provided by law, nor induced her to shift her position, there is no foundation for a plea of equitable estoppel.

Homestead Ass'n vs. Garland, 476.

TAXING DISTRICT—

The boundary line of a taxing district is designated with sufficient certainty by the following language: "Starting from the northeast corner of the northeast quarter of the southeast quarter of section 18, and running thence three miles west on the section line to the northwest corner of the northwest quarter of the southwest quarter of section 14." The *termini* and the direction of the line are unmistakable. The phrase, "on the section line," is shown by the context to have the meaning of parallel with the section line.

Burnham et al. vs. Police Jury of Claiborne Parish, 513.

TAX SALE—

Where a person's property is seized by the sheriff in execution of a *fi. fa.*, the owner's possession is broken and replaced by that of the sheriff. It is the sheriff who, thereafter, holds possession of the property for delivery to the purchaser at the subsequent judicial sale. The owner's possession being broken after a judicial sale to another, he stands as a third person to the property. Where the

TAX SALE—*Continued.*

same property is afterwards sold at a tax sale under an assessment made in the name of the purchaser at the execution sale, there is no legal reason why the original owner should not hold possession under and for the tax purchaser, nor why he should not later purchase it from him and own and possess it for himself. Under such circumstances, his title would be a new title, and he could, for the purposes of prescription, tack on his author's possession to his own. Where, under the pleadings, the purchaser of property at a tax sale is admittedly in good faith up to citation upon him in a petitory action, prescription *acquiesci causa* runs in his favor and those holding under him from the date of the tax sale.

Gauthier vs. Cason et als., 52.

Article 233, of the Constitution of 1898, declares that no sale of property for taxes made prior to the adoption of the Constitution shall be set aside for any cause, except on proof of dual assessment, or the antecedent payment of taxes, unless the proceeding to annul is instituted within three years from the adoption of the Constitution. That provision of the Constitution was intended to have the effect of a statute of repose. After the lapse of the three years from the adoption of the Constitution, the party in possession under his tax title, which has been duly recorded, cannot be disturbed except for the two clauses mentioned. Certainly, the claimant owner out of possession cannot be heard to urge other causes for setting aside the adverse tax title, or preventing its confirmation.

Canter vs. Heirs of Williams, 77.

The owner ratified by notarial act a tax sale of her property, as legal (owned by plaintiff under the tax deed). Her grandchildren, among them the defendants, also ratified this deed. If there was an ulterior purpose, as alleged, in the ratification, not disclosed by the deeds confirming the tax deed, and in reality, all these ratifications were made because it was expected that the property conveyed still remained, despite the tax sale, the property of the tax debtor, the purpose cannot be shown (over the purchaser's objection) by oral testimony. The suit is, in its effects, *inter partes*. It is not a suit by forced heirs seeking their *legitime*, or by creditors, to set aside a sale, but by the parties themselves who are personally bound, and also bound as heirs of the former owner of the

TAX SALE—Continued.

property. A tax sale made in 1890 in enforcement of State taxes of 1889 on property assessed in the name of the original owner who died in 1876. His succession had been opened in 1881, when his sons were recognized as his sole heirs. His widow remained in possession as owner of one-half and usufructuary of the other half. The only notices recited as having been given were notices addressed to the original owner. The validity of the tax sale was put at issue in 1894. The widow ratified the sale. *Held*—Her ratification extended only to her undivided half. The sale as to the other half was set aside as invalid. *Levy vs. Levy et al.* 576.

The confirmation by the old Board of Commissioners for the Western District of the Territory of Orleans, under the Act of Congress of 1807, of a claim to land based upon occupancy and settlement followed by the confirmation by Congress of the claim so confirmed, operated as effectually as a grant or quit claim from the government. The ownership of the confirmee to the land was not held in abeyance until a patent issued. The patent was simply documentary, recognitive, evidence of the existence of the confirmed title. Property so confirmed became, from the date of the confirmation, subject to State taxation. The mere failure of a tax collector to make, in his deed, recitals of fact which it would have been proper for him to have made, does not render the tax sale to which it refers, *ipso facto*, an absolute nullity, and open as such to collateral attack, nor does such fact destroy the good faith of the purchaser in taking possession of and holding the property as owner under it. The existence of a defect in a tax sale, resulting from a defect in the assessment of the property, does not deprive the sale from being made the basis of the prescription of ten years, where defect is a latent one, which purchaser was not called upon to ascertain or know. *Jopling vs. Chachere et als.*, 522.

Under article 210 of the Constitution of 1879, and Act 85 of 1888, it was not obligatory upon the tax collector to recite in his tax deed the fact that, before offering the property as a whole, he had offered the least quantity that any bidder would buy for the taxes, interest and costs due thereon, and, if it be a fact that such previous offering was made, the tax purchaser should be permitted to prove it by evidence *aliunde* unless to do so would be to contra-

TAX SALE—*Continued.*

dict the positive recitals of the deed. Where the tax deed, in such case, is susceptible of interpretation, the presumption established by the Constitution in favor of its *prima facie* validity extends to the meaning of the language used, and it will be presumed, *prima facie*, that, of two possible meanings, that meaning was intended agreeably to which the deed may be valid rather than that which must render it void. Where two or more vacant lots, of the same size and value, in a city or town, are assessed together, for a lump sum, the constitutional requirement, as to offering the "least quantity," may be complied with, either by offering one of the lots or by asking bidders to compete by stating and designating the least quantity that they may be willing to buy for the taxes, interest and costs due on the whole. The failure of the collector to offer the least quantity before selling the whole property affects the title with a vice for which it may be annulled in an action brought within the legal delay, but which is not so radical as to protect the owner against the prescription denounced by section 66 of Act 85 of 1888, or section 5 of Act 105 of 1874.

Cane vs. Herndon, 591.

TUTORS AND MINORS—

The minor's marriage without the consent of her tutrix, although in every respect legal, did not have the effect of emancipating her from the disabilities of minority. The mother's kindness to her daughter and her son-in-law after the marriage, which has no appearance of any intention to condone the fact that her consent had not been sought or obtained, does not have the effect of supplying the want of consent of the mother and tutrix. Jurisprudence of this State and of other States, of this country as well as foreign, has always attached importance to the consent which minors should obtain before their marriage. The court deals only with the question growing out of the failure of the minor to obtain the tutrix's consent before marriage. Other issues are not brought before the court by the record so as to justify it to pass upon them. The minor has not been emancipated and could not compel an accounting as asked by her.

Guillebert vs. Grenier, 614.

USUFRUCT—

Security to secure the return of the property may be required of the usufructuary, which, however, cannot be made to operate as a hinderance to the enjoyment of the property, for the usufructuary is entitled to the revenues resulting, after having complied with the articles of the Code on the subject, even though he may not have furnished security. The one treated as usufructuary cannot be required to pay the debts of the succession before going into possession and enjoying the usufruct.

Succession of Weller, 466.

Ex. J. M.

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